

Awqaf Experience in Sri Lanka

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While the focus of this paper would be on the socio-economic potential and administration of Wakfs in Sri Lanka, an endeavour would be made to outline its historical background and development and to comment critically on the inadequacies and deficiencies in the law and the administrative machinery in existence in this country.

Introduction

In Sri Lanka the term *wakf* is used to refer to charitable trusts created by one or more Muslim persons for any purpose recognized by Muslim law as religious, pious or charitable. The institution has immense socio-economic potential, and its administration is at present governed by the Muslim Mosques and Charitable Trusts or *Wakfs* Act of 1956⁽¹⁾. Although the said Act does not seek to define the term *Wakfs*, it is clear that the enactment governs Muslim charitable trusts created for all or any of the following purposes:

- a - The relief of poverty among Muslims or any section thereof.
- b - The advancement of education of Muslims or any section thereof.
- c - The advancement of Islam generally.
- d - The management of any mosque or Muslim shrine or place of religious resort or the performance of religious rites or practices at such mosque, shrine or place or any other place whatsoever.
- e - Any purpose beneficial to Muslims or any section thereof, and
- f - Any other purpose recognized by Muslim Law as religious, pious or charitable⁽²⁾.

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(1) The Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.

(2) Ibid., Section 32 (1).

While the focus of this paper would be on the socio-economic potential and administration of *Wakfs* in Sri Lanka, an endeavour would be made to outline its historical background and development in Sri Lanka and to comment critically on the inadequacies and deficiencies in the law and the administrative machinery in existence in this country.

Characteristics of *Wakfs*

In Sri Lanka, *Wakfs* may be created for any purpose recognized by Muslim law as religious, pious or charitable⁽³⁾. The Muslim Mosques and Charitable Trusts or *Wakfs* Act of 1956 expressly provides that in determining any question relating to the existence or constitution of any trust or wakf or in settling schemes for the management of a wakf the *Wakfs* Tribunal⁽⁴⁾ shall have regard to the 'instrument', if any, by which such trust or wakf has been created, the religious law or custom of the sect of the Muslim community concerned, the local custom with reference to such trust or wakf and the practices and other arrangements in force for the administration of such trust or⁽⁵⁾.

Wakf literally means detention, but its legal meaning is the dedication of property in the name of Allah for the benefit of certain people for a good purpose, whether religious, pious or charitable. In reality, it is a detention of a specific thing from the ownership of the dedicator and the appropriation of its profits for the benefit of specific beneficiaries. Verma⁽⁶⁾ defines *Wakfs* as.

"... an unconditional and permanent dedication of property with implied detention in the ownership of God in such a manner that the property of the owner may be extinguished and its profits may revert to be applied for the benefit of mankind except for purposes prohibited by Islam".

The establishment of *Wakfs* is supererogatory (mustahab), but is not obligatory like Zakat. The Holy Quran makes no direct reference to the

(3) Ibid. Section 32 (1) (f)

(4) The establishment of the Wakfs Tribunal is governed by Section 9D of The Muslim Mosques & Charitable Trusts or Wakfs Act, supra note 1.

(5) Ibid., Section 41.

(6) B.R. Verma, Islamic Law (1988), page 622.

concept of *wakf*, but the provision is covered in a large number of verses scattered throughout the Holy Quran on the theme of *infaq fi sabil Allah*, i.e. spending in the path of Allah. As noted earlier, the institution has the sanction of hadith according to the Sahih al-Bukhari, Abu Talha gave his choicest piece of land known as the Bairuha orchard in Medina to the Holy Prophet as a gift. The Prophet gave it back to him advising that he should make it an endowment for his relatives. Abu Talha thereupon gave the orchard to Ubayy and Hassan.⁽⁷⁾

It is possible to classify *Wakfs* in many ways. Abdur Rahman Doi classifies them as Waqf al Ahli (family waqf) and Waqf-al-Khayri (welfare *wakf*).⁽⁸⁾ The first type is created for the security and welfare of near relative of the dedicator and his family to ensure that they get their needs for all their life, and after their death for the benefit of the poor. Welfare *Wakfs* could be created for the welfare of the needy such as orphans, refugees, destitutes, blind and other handicapped people and for the establishment and maintenance of mosques, graveyards, schools, hospitals and other places of public welfare. Ameer Ali classifies *Wakfs* under three headings:

- 1) Public waqfs - designated masalih-al-'amma - for example the building of a mosque or school.
- 2) Quasi public waqfs - a trust created primarily for a pious purpose and partly for the benefit of particular persons or members of the family of the settlor.
- 3) Private waqfs - primary object of which is to benefit individuals including the members of the settlor's family⁽⁹⁾.

In this context, it is also important to point out that the similarities between the Islamic *wakf* and the English concept of charitable trusts has been commented upon. There is indeed a view that the English trust derives from the institution of *wakf*.⁽¹⁰⁾ On the other hand, it has been

(7) Sahih Al-Bukhari, Vol.4, Book LI The book of Wasaya, Dar Al Arabia, Beirut Chap. 17

(8) Abdur Rahman I.Doi, Shariah: The Islamic Law, (1984) page 340

(9) Ameer Ali, Mohammedan Law, Vol. I, (1985) page 194

(10) See, the detailed argument to this effect by Henry Cattan in Khadduri and Leibesny, Law in the Middle East (1955), Vol. 1 Pages 203-218.

pointed out that the *wakf* / trust similarity only indicates the possibility that Islamic law inspired the development of the law of trust in England and not the fact of such a connection.⁽¹¹⁾ As Dr. Weeramantry observes,

“Whatever view one holds on this matter, it must be admitted that the similarities are remarkable and the developed Islamic notion long antedated the first English gropings towards such a concept - a concept which the celebrated English legal historian Professor Maitland described: if we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea, (Maitlan, 1968, reprint, p. 129). We must note also that as Pollock and Maitlan observe (1952.Vol. 1 p 520) the notion of permanent trusteeship (so well known in Islam) was, in the thirteenth century as yet unknown to the (English) Law.....”⁽¹²⁾

However, it has to be emphasised that *Wakf* is a unique institution developed by Islamic law. Although there are some similarities to charitable trusts as understood in English Law⁽¹³⁾. Some features of *Wakfs* that distinguish this institution from the English concept of trusts, as applied in Sri Lanka, may be noted. Firstly, while both a *wakf* and a trust may be created with the objective of advancement of religion, the Sri Lankan Trusts Ordinance of 1917 has no application to a religious trust or *Wakfs* regulated by the Muslim Mosques and Charitable Trusts or *Wakfs* Act of 1956.⁽¹⁴⁾ Secondly, while a trust may be created for any lawful object, a *wakf* may only be ordained for a purpose recognised by Muslim law as religious, pious or charitable. Thirdly, although the settlor of a trust may be a beneficiary under it, according to the Shafie view considered to be applicable in Sri Lanka, the dedicator cannot benefit from a *wakf*.⁽¹⁵⁾

(11) See, G.M. Badr, *Islamic Law, Its Relation to Other Legal Systems*, American Journal of Comparative Law, (1978) Vol. 26 page 185.1

(12) C.G. Weeramantry, *Islamic Jurisprudence*, (1988) page 742

(13) It is noteworthy that the English law of trusts has been made part of the laws of Sri Lanka by the Trusts Ordinance No.9 of 1917 as amended by Ordinances No.4 of 1918 and I of 1934 and Acts No.7 of 1968 and 30 of 19713

(14) See, Section 109 (b) of the Trusts Ordinance, *ibid*,4

(15) Dr.M.S.Jaldeed *The Muslim Law of Succession, Inheritance & Wakf in Sri Lanka* (1993), page 274.5

Fourthly, any person, including a Muslim, could create a trust, but a *wakf* may only be created by a Muslim. Similarly, while any transferable property may be subjected to a trust, *Wakfs* may only be created in relation to specific properties⁽¹⁶⁾. Sixthly, while the powers of a trustee of a trust governed by English law are extensive, the powers of the mutawalli under a *wakf* are restrictive. Seventhly, while a trust is restricted in time⁽¹⁷⁾, a *wakf* is perpetual. Finally, while trust property could revert to the author when the trust becomes incapable of execution or does not exhaust the trust property, *Wakfs*, being irrevocable and perpetual, *wakf* property do not revert to their creators as they are immobilised and irrevocably transferred to God

Socio-economic Potential of *Wakfs*:

It is a pity that in Sri Lanka where there are more than 1500 registered mosques and a Muslim population exceeding 8 million, there are only 41 charities registered under the Muslim Mosques & Charitable Trusts or *Wakfs* Act of 1956⁽¹⁸⁾. Of this only about 5 are in fact functioning effectively. The majority of the charities registered under the Act (other than the mosques, thakkiyas and zaviyas registered under Part II or IV of the Act) have been established for the furtherance of Arabic & Islamic education. The best examples of such *Wakfs* are the Ibrahimiyah Trust and the Gafforiya Trust. There are also charities established with the objective of poverty alleviation such as the Haji Omar Trust, but they are for various reasons not functioning as efficiently as they were intended to function.

This does not mean that the Muslims of Sri Lanka are any the less generous than their brethren elsewhere in the world or that there are no needy Muslims in Sri Lanka. On the contrary, all Sri Lankans are by nature friendly and generous, and the Muslims of Sri Lanka are well known for their charitable disposition particularly during the month of Ramadan. There are also among the Muslims of Sri Lanka many who live

(16) On this subject, see. Dr. Jaldeen *ibid*, pages 282-288.6

(17) See, Section 110 of the Trusts Ordinance, *supra* note 137

(18) The Muslim Mosques and Charitable Trusts or *Wakfs* Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.8

below poverty line, including thousands of Muslim refugees who were driven out from the Northern & Eastern Provinces of Sri Lanka by the LTTE. Although it is often alleged that Muslims are very rich, the per capita income of the Sri Lankan Muslim is lower than that of the majority community Sinhalese. Moreover, less than 30 per cent of the Muslims are in regular employment. More than 30% of those in employment work on a casual, which is the highest for any community⁽¹⁹⁾. What the above facts and figures do demonstrate is the acute need for socio-economic development in Muslim society, and the lack of appreciation of the Muslims of Sri Lanka of the value of the institution of *Waqfs* and its enormous socio-economic potential.

Islam encourages charity. It is narrated by Abu Huraira that when a man asked the Holy Prophet “O Allah’s Apostle! What kind of charity is the best?” Prophet Muhammad replied as follows: “ To give in charity when you are healthy & greedy, hoping to be wealthy, and afraid of becoming poor. Don’t delay giving in charity till the time when you are on the death bed when you say, “give so much to so-and-so and so much to so-and-so”, and at that time the property is not yours but it belongs to so-and-so (i.e. your inheritors)”⁽²⁰⁾. Of the various forms that charity could take, *Wakfs* is the most noble as it is a dedication to God, and the most enduring as it is given in perpetuity. The concept of *wakf* is attributed to the Tradition of the Holy Prophet (SAS), handed down in succession by Ibn Auf, Nafa and Ibn Omar, according to which Omar had acquired a piece of land in (the canton of Kaibar) and had sought the counsel of the Apostle of Allah (SAS) who is said to have stated: -

“Tie up the original property and devote the usufruct to human beings which is not to be sold or made the subject of a gift or an inheritance. Bring the product to your children, or relatives and the needy in the path of Allah”⁽²¹⁾

(19) M.N.Junaid, Employment Opportunities for Muslims with Special Emphasis on Agriculture & the Public Sector, Challenge for Change: Profile for a Community (MWRAF-1990), 43 at page 55. 9

(20) Sahih Al-Bukhari, Vol.4, Book L1 The book of Wasaya, Dar Al Arabia, Beirut Chap. 11.0

(21) Sahih Al-Bukhari, Vol.4, Book L1 The book of Wasaya. Kazi Publications, Lahore Chaps. 15, 16 as quoted in Dr. M.S. Jaldeen. The Muslim Law of Succession Inheritance & Wakf in Sri Lanka (1993), page 270.

Omar dedicated the property, and the *wakf* created is said to have continued for centuries. According to Abdur Rahman Doi, the history of *wakf* started right in the time of Prophet Muhammad when the very first mosque and Islamic center was built by the Prophet in Medina in the first year of Hijra. The Prophetic Mosque or Al Masjid al-Nabawi, as it is called, was built on a parcel of land belonging to two orphans. In spite of the Prophet's insistence to pay for the land, the orphans insisted that they would not accept the price from the Prophet, but would take it from Allah in the world to come. The establishment of *wakf* continued in the Prophet's time when "Uthman, who later became the third Caliph, bought a well and made it a trust property for the charitable use of all and sundry in order to relieve Muslims of the difficulties imposed by Jews who banned Muslims to draw water from another well⁽²²⁾. Dr. Jaldeen refers to certain *Wakfs* whose beneficiaries were not the general public but members of certain families such as the *wakf* of Omar to the land called Sammagh for his children, the *Wakf* of Zubair Ibn Awwam, the nephew of the Prophet, for his daughter, the *Wakf* of Akram in favor of his son, the *Wakf* of Abu Bakr, the first Caliph, in favor of his children and the *Wakf* of Sa'ad Ibn Abi Wakkas, the conqueror of Persia under the first Caliphate of Omar, of his lands for his children⁽²³⁾.

One of the drawbacks in the context of encouraging the creation of *Wakfs* in Sri Lanka is the generally held belief that the Shafie Law, applicable in Sri Lanka, does not sanction the establishment of private, as opposed to public, *Wakfs*. For instance Dr. Jaldeen observes:

"According to the Shafie School, a wakf in favor of either the dedicator, or his family or descendants or any stranger is not valid unless the object of the wakf is for a religious or charitable purpose. Private wakf, as understood in the Indian law, based on the Hanafi law, is not found in Sri Lanka. The primary reason being that Sri Lanka Muslims are followers of the Shafie sect⁽²⁴⁾.

(22) Abdur Rahman I. Doi, *Shariah: The Islamic Law*, (1984) page 338.

(23) Dr. M.S. Jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka* (1993), page 271.

(24) *Ibid*, page 293.

It is doubtful whether the above passage reflects the correct position under Shafie law. It is clear from a reading of Minhaj et Talibin⁽²⁵⁾, the authoritative manual of Shafie law, that a *wakf* in favor of the family or descendants of the dedicator is lawful. The said text states that -

“A foundation expressed in the words, “I make such and such a thing wakaf for a year”, is null and void; but if the words used are, “I make it wakaf in favor of my children”, or “in favor of so-and-so and after him of his descendants”, and nothing else, the foundation remains intact, even after the extinction of the family.

The usufruct then goes to the nearest relative of the founder upon the day of the extinction of the beneficiaries designated by him”. It is further started in the text that -

“A wakf in favor ‘of my children and grandchildren’ results in the usufruct being divided equally between all the children and grandchildren alive on the day of the foundation, even though one may have added ‘who are their descendants’ or ‘generation after generation’. Where, on the contrary, one has used the words, ‘in favor of my children, then of my grandchildren, then of my great grandchildren who are their descendants’, or ‘in favor of my children and my grandchildren, the one after the other’, or ‘the former first’, there is successive enjoyment by the different generations, and the first are merely fiduciary beneficiaries⁽²⁶⁾”.

It is pertinent to observe that according to Hanafi jurists, it is lawful to create *Wakfs* exclusively for the benefit of one’s family and descendants.

(25) Nawawi, Minhaj et Talibin, A Manual of Muhammadan Law, (1992) Book 23, Section 1.

(26) Ibid., Section 2. This passage has the flavour of a fideicommissa which has been abolished in Sri Lanka by the Abolition of Fideicommissa Act No. 20 of 1972 as amended by Law No. 13 of 1972. In fact, Section 5 of this Act provides that where under the terms of any trust there is provision for the succession to the interest of a beneficiary by any other succeeding beneficiary upon the happening of some future event, then the interest of the beneficiary in whom the beneficial interest is vested shall be deemed to be absolute, and no other succeeding beneficiary shall have any right to succeed thereto. However, it is expressly provided in the proviso to this section that the said provision shall not apply to Muslim charitable trusts or Wakfs.

Ameer Ali quotes with approval the following passage from Fath-ul-Kadir, a work of great authority in India -

“ A large number of the Companions of the Prophet (SAS) made Wakfs, and an authentic account of such Wakfs... are the Wakfs of (the Caliph) Omar (may God be pleased with him) of his land called Samagh at Khaibar... that created by Zubair-bin-Awwam for (the support of) his daughter who had been divorced; the wakf of Osman-bin-Arkam Makhzumi on his children & descendants of his house called Darul-Islam at Safa (near Mecca), where the Prophet used to preach Islam and where many of the disciples (among them Omar) accepted the faith... Baihaki in his Khilafiat has stated upon the authority of Abu Bakr Obaidullah Bin Zubair al Humaidi that (the Caliph) Abu Bakr had a house in Mecca which he made in favor of his children, and that is still in existence... and Saad Ibn Wakkas made a wakf of his house in Medina and in Egypt in favor of his children... and (the Caliph) Osman made a wakf of his lands on his descendants...⁽²⁷⁾ ”.

According to Abu Yusuf, a leading Hanafi authority, a dedicator may even create a *wakf*, reserving the benefits to himself as our Prophet has declared that “ a man making provision for his (future) subsistence is doing a pious act...” and “ no gain of a man is so meritorious as that which is earned by the labor of his hands and his making a provision for the maintenance and support of himself, his family and his dependants, is *sadakah*⁽²⁸⁾”.

However, the Judicial Committee of the Privy Council took a contrary view in the leading case of Abdul Fala Mohammed Ishak v. Rossomay Dhur Chowdhury⁽²⁹⁾. This decision was followed in another Privy Council decision in which Their Lordships held that a *wakf* in favor of the dedicator’s family is valid only if there was “a substantial dedication of the property to charitable users at some period of time or the other⁽³⁰⁾. It therefore became necessary in India to enact legislation to make it lawful for any person professing the Mussalman faith to create a *wakf* for

(27) Ameer Ali, Mohammedan Law, Vol. 1. (1985) page 280 et seq.

(28) Ibid.

(29) (1894) ILR 22 Cal. 619; 22 IA 76 (PC)

(30) See, Shaik Mohammed Ahsanullah Chowdhury v Amarchand Kundu (1899) 17 ILR Cal. 498; 17 IA 28 (PC).

the maintenance and support wholly or partially of his family, children or descendants, and where the person creating the *wakf* is a Hanafi, for his own maintenance and support during his lifetime provided that the ultimate benefit in such cases is expressly or implicitly for the poor or for any other purpose recognized by Mussalman law as religious, pious or charitable⁽³¹⁾.

As noted earlier, in Sri Lanka *Wakfs* may be created for “any purpose recognized by Muslim law as religious, pious or charitable⁽³²⁾”. According to section 41 of the Act, the constitution or existence of any trust or *wakf* has to be determined having regard “to the instrument, if any, by which such trust or *wakf* has been created, *the religious law or custom of the sect of the Muslim community concerned*, the local custom with reference to such trust or *wakf* and the practices and other arrangements in force for the administration of such trust or *wakf*⁽³³⁾”. It is to be noted that the difficulty in regard to the interpretation of the provisions of the Muslim Mosques and Charitable Trusts or *Wakfs* Act of 1956 quoted above, in particular, the words in italics, is that the Act does not indicate what is ‘Muslim law’ or seek to define the term ‘sect’ or enumerate the source or source from which “the religious law or custom of the sect of the Muslim community concerned” could be extracted.

The courts of Sri Lanka have held consistently that as Sri Lankan Muslims largely belong to the Shafie sect “the Shafie doctrine is generally applicable⁽³⁴⁾” and a party should be presumed to be a Shafie unless there is evidence to the contrary⁽³⁵⁾. Sri Lankan courts have applied the law of the sect of the parties even in matters, such as donation⁽³⁶⁾, which are not governed by specific legislation. It is likely that the Shafie view referred to by Dr. Jaldeen, which does not permit the establishment of *Wakfs* for the

(31) See, Section 3 of Mussalman Wakf Validating Act of 1913.

(32) See, Section 32 (1) (f) of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.

(33) Section 41.

(34) *Affefudeen v Periatamby*, 14 NLR 295 at page 300 per Middleton J.

(35) See, *Mangandi Umma v Lebbe*, 29 NLR 136; *In re Nona Sooja* 32 NLR 63; *Ummul Marzoonah v Samad* 79 NLR 209.

(36) See, *Affefudeen v Periatamby*, supra note 34, specially at 300 where Middleton J. referred to the “the Shafie doctrine on the subject”.

benefit of oneself or one's family, would prevail if the issue arises in any case in Sri Lanka. It may be pointed out that even in such a case, it can be argued that even if the Shafie law does not permit the creation of a *wakf* in favor of the dedicator, it is still lawful to create such a *wakf* by express words, in view of Section 41 of the Act. As noted earlier, the *Wakfs* Tribunal is bound to have regard, among other things, to the words of the instrument by which a trust or *wakf* has been created in determining its legality.

Section 41 also makes it incumbent to have regard to the religious law or custom of the sect of the Muslim community concerned for the purpose of making any determination regarding the constitution or existence of any trust or *wakf*. In this context, it is worthwhile remembering that the two great sects of Islam are the Sunni and Shiah sects. The divergence of legal doctrine in Sunnite Islam, which has the allegiances of the vast majority of the Muslims, is crystallized in the existence of four different schools of law, named after the jurists who founded them, namely, the Hanafi, Maliki, Shafie and Hanbali schools. The Shiah sect, is in turn divided into three major schools, known as Ithna 'Ashari, Ismaili (which includes the Dawoodi sub-school to which the Bohras belong) and Zeydi⁽³⁷⁾. On the other hand, a school of thought such as the Shafie school, is merely a 'way' or madhab and should not be treated as a sect⁽³⁸⁾.

One obvious result of equating a school of thought to a sect is that an adherent of a particular madhab such as the Shafie school will be rigidly bound by the teachings of that school, and will not have the freedom to deviate from these percepts unless he declares himself to be a follower of a different school of thought. It is questionable whether such an inflexible approach can be reconciled with the spirit of the madhabs themselves particularly in the context that Imam Shafie himself was a student of

(37) For an extremely interesting exposition of the various sects and schools of Muslim law, see C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988 edition), Chapter 4 pages 46 to 58. For a brief description, see L.J.M. Cooray, *An Introduction to the Legal System of Sri Lanka* (1991 edition) page 132.

(38) Hamilton A.R. Gibb, *Mohammedanism* (1955 edition), page 82; H.M.Z. Farouque, *Muslim Law in Ceylon: An Historical Outline*, 4 MMDLR 1 page 26, footnote 67.

Imam Malik, and has his only son instructed by none other than Imam Hanbal. It is said that Imam Shafie was born on the very day Imam Abu Hanifa departed this world, and in a biographical sketch of Imam Shafie it is narrated that -

“Al-Shafii admired men of learning; he considered that there was none so perfect as Imam Malik in knowledge, but for whom & Sufyan b. Uyaina, he said, hadith would have disappeared in the Hijaz; though his teachings differed from Imam Abu Hanifa’s, he once remarked, “in matters concerning Fiqh all of us are followers of Imam Abu Hanifa”. When he spent a night in the shrine of Imam Abu Hanifa, he led Isha and Subhu prayers as a Hanafi, omitting to recite Bismilla aloud or Qunut at Subhu, and explained that he acted so out of respect for the Imam Abu Hanifa in whose presence they were⁽³⁹⁾”.

It has also been suggested that the rigid classification of persons as the followers of the Hanafi, Maliki, Shafie and Hanbali 'sect' is not consistent with certain Quranic injunctions⁽⁴⁰⁾. Of particular interests, in this connection, is the following verse from Sura Al-An'am in which Allah frowns upon the divisions of religion into sects so as to break up the unity of Islam. Addressing Prophet Mohammed (PBUH), Allah says -

“As for those who divide Their religion and break up Into sects, thou hast no part in them in the least: Their affair is with God: He will in the end tell them the truth of all that they did⁽⁴¹⁾”

(39) Mapillai Alim, Fat-Hud-Dayyan fi Fiqhi Khairil Adyan, (Translated by Saifuddin J. Aniff-Doray) (1963 edition) page 534.

(40) Saleem Marsoof, Fallacies of Muslim Law (1996-1997) Meezan page 63 at page 66.

(41) The Holy Quran (Edited by Abdullah Yusuf Ali) Sura Al-An'am VI:159 Abdullah Yusuf Ali, in his commentary on this verse, observes that the Arabic term 'farraqu', which literally means "divide the religion", may connote one or more of four types of religious division, such as endeavors by man to "(1) make a distinction between one part of it and another, take the part which suits and reject the rest: or (2) have religion one day of the week and the world the rest of the six days; or (3) keep "religion in its right place", as if it did not claim to govern the whole life; make a sharp distinction between the secular and the religious; or (4) show a sectarian bias, seek differences in views, so as to break up the unity of Islam". (vide note 985)

It is quite obvious that the judicial equation of schools of law with sects gave rise to some of the most knotty problems in the field of Sri Lankan Muslim law. Such equation also has the undesirable effect of depriving the courts and tribunals administering Muslim law in Sri Lanka of an extremely effective instrument of legal development. It is therefore submitted that the term 'sect' in the applicable statutory provisions should be interpreted to mean the Sunni & Shiah sects, so that the views of jurists who do not belong to the Shafie school may be adopted in Sri Lanka where they are progressive and in accord with the Sunna of the Prophet. Indeed, practical and pragmatic considerations favor the view that there should be legal provision for creating an endowment in favor of the dedicator or his family and descendants, as suggested by Hanafi jurists. Such an eclectic approach would, no doubt, help the great institution of *Wakfs* to have its maximum impact on the social fabric of Sri Lanka.

Wakf Administration: Some Historic Perspectives

Before considering the administrative machinery available in Sri Lanka to deal with *Wakfs*, it is necessary to outline the history of the institution in Sri Lanka. Pursuant to the pledge that the administration of justice shall be continued in Sri Lanka (then Ceylon) "in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces"⁽⁴²⁾, the British rulers of Sri Lanka recognized and applied principles of Muslim law that were in force under the Dutch and the Sinhalese kings⁽⁴³⁾. The phrase "laws and institutions that subsisted under the ancient Government of the United Province..." referred to the customary laws by which the Muslims were governed during the time of the Dutch rule in Sri Lanka, which were confined to matters of inheritance, succession, marriage and divorce. These "Special Laws relating to Moors or Mohammedans and other native races" had been embodied by the Dutch in a volume entitled "Byzondere Wetten angaade Mooren of Mohammedanen en endere inlandshe natien"⁽⁴⁴⁾. The Code of

(42) Sections 1 & 2 of the Proclamation of 23rd September, 1799.

(43) Section 32 of the Charter of 1801.

(44) See, De Vos, Mohammedan Law, LIV CLW 108 at 110 op, cit and H.M.Z Farouque, Muslim Law in Ceylon - An Historical outline reproduced as Appendix B in Dr. M.S. Jaldeen, The Muslim Law of Marriage, Divorce and Maintenance in Sri Lanka (1990).

Mohammedan Law adopted by the British in 1806 appears to have been based on the Byzondere Wetten and has regarded as binding “even if the provisions contained therein appear to clash with well-established principles of Mohammedan Law⁽⁴⁵⁾”. This code, however, did not contain any provisions relating to *Wakfs*, and has now been replaced altogether by subsequent legislation⁽⁴⁶⁾.

Until 1931 disputes involving *Wakfs* were resolved by applying the general law of the land, as the Mohammedan Code of 1806 did not have any provisions relating to these matters. Although the courts were reluctant to interfere with proceedings of ecclesiastical bodies⁽⁴⁷⁾ or to be dragged into controversies involving religious doctrines⁽⁴⁸⁾, they did grant relief where there had been some infringement of civil rights of a pecuniary or personal nature “even although for the purpose of investigating such claims it became necessary to deal with religious privileges⁽⁴⁹⁾. Thus, in *Abdul Aziz v Abdul Rahim*⁽⁵⁰⁾ the Privy Council held that a ‘trustee’ of the Maradana Jumma Mosque who has been forcibly dispossessed by another person claiming to have been elected trustee by the jama’ath (congregation) could successfully invoke the possessory remedy even though he had not held the property *ut dominus*.

The Property & Trustee Ordinance⁽⁵¹⁾, which applied not only to private but also to public trusts, provided the initial statutory framework for the resolution of disputes relating to the administration of trusts arising from the death, incapacity or misconduct of the trustee or trustees.

(45) *Bandirala v Mariuma Natchia*, 16 NLR 235.

(46) See, The Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929 amended by Ordinance No. 9 of 1934 and The Muslim Intestate Succession and Wakfs Ordinance No. 10 of 1931. It is relevant to note that the Muslim Marriage and Divorce Registration Ordinance of 1929 was itself replaced by the Muslim Marriage and Divorce Act No. 13 of 1951 as amended by Acts No. 31 of 1954, 22 of 1955, 1 of 1965, 5 of 1965, 32 of 1969 and La No. 41 of 1975. Similarly, the provisions of Muslim Intestate Succession and Wakfs Ordinance relating to Wakfs have now been replaced by The Muslim Mosques and Charitable Trusts or Wakfs Act, *supra* note 1.

(47) *Nuku Lebbe v Thamby et al* 16 NLR 94.

(48) *Pitche Thamby et al vs. Cassim Marikar et al* 18 NLR III: 18 NLR 117.

(49) per Woodrenton J in *Nuku Lebbe v Thamby et al* 16 NLR 94, 96.

(50) 12 NLR 330.

(51) The Property and Trustee Ordinance No. 7 of 1871.

Section 639 of the Civil Procedure Code⁽⁵²⁾ No.2 of 1889 (now repealed) provided, inter alia, for the settlement of schemes of management for the administration of any trust “created for public charitable purposes” and for the appointment and removal of trustees. In *Rustomjee v Khan*⁽⁵³⁾, the Supreme Court, in rejecting the contention that Section 639 of the Civil Procedure Code had superseded the Property and Trustee Ordinance so far as public charitable trusts were concerned, favored the view that these statutory provisions could co-exist. While both statutes were found useful in resolving disputes relating to Muslim charitable trusts and mosques, it was the Trusts Ordinance⁽⁵⁴⁾ that for the first time provided that the courts shall have regard “to the religious law and custom of the community concerned” in setting any scheme for the management of a trust⁽⁵⁵⁾. The first Sri Lankan judgment in which reference is made to the principles of Muslim Law relating to wakfs⁽⁵⁶⁾ dealt with the applicability of the provisions of the Trusts Ordinance to an endowment of a mosque. The Supreme Court held that such an endowment, where the founders were mutawalli was valid and that a woman (one of the founders - the other being the husband) could also be a mutawalli⁽⁵⁷⁾.

The Muslim Intestate Succession and *Wakfs* Ordinance⁽⁵⁸⁾ was the first legislative attempt to deal with Muslim charitable trusts apart from other trusts. The preamble to this statute described it as an Ordinance to define the law relating to Muslim Intestate Succession, Donations and Charitable Trusts or *Wakfs*. The definition of charitable trust contained in Section 6 of the Ordinance was a virtual reproduction of Section 99 of the trusts Ordinance and equated the English Law concept to Charitable trusts with *wakf*. Dr. Jaldeen observes⁽⁵⁹⁾ that several important provisions

(52) See, Section 639 of the Civil Procedure Code No. 2 of 1889. This provision has since been repealed, although the Civil Procedure Code is still in force.

(53) 18 NLR 120.

(54) Trusts Ordinance No. 9 of 1917 as amended by Ordinances No. 4 of 1918 and 1 of 1934 and Acts No. 7 of 1968 and 30 of 1971.

(55) Ibid, Section 106.

(56) *Mohomedu v Meera Kandu*, 24 N.L.R. 390.

(57) For a criticism of this decision, see Dr. M.S. Jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka*, (1993) pages 318-321.

(58) The Muslim Intestate Succession and Wakfs Ordinance No. 10 of 1931.

(59) Dr. M.S. Jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka*, (1993) page 323.

of the Muslim Intestate Succession and *Wakfs* Ordinance of 1931 were virtual reproductions of certain provisions of the Trusts Ordinance.⁽⁶⁰⁾ He criticizes this as a complete departure from the laws as it stood from the Charter of 1801, which recognized the special laws, customs and institutions of the Muslims.

Another shortcoming of this Ordinance was that it did not provide for a central authority such as the *Wakfs* Board to supervise the administration of *Wakfs*. The late justice M.T.Akbar, who led the cry for reform emphasized that while the want of proof and the want of funds for prolonged litigation hamper errant trustees being brought to justice, the defaulting trustee could make use of the mosque funds to put every obstacle in the way of plaintiffs and he could make use of every legal device to drag out litigation⁽⁶¹⁾. The wisdom contained in those words is amply illustrated by the litigation involving the Kataragama Mosque and Kadiriya Thakkiya at Hambantota⁽⁶²⁾ which commenced in 1951 but was not put to rest even by the settlement of a scheme of management and the appointment of a trustee by the Court, as the trustee so appointed and thereafter his son (appointed as trustee by Last Will) failed to submit annual audited accounts either to Court or to the *Wakfs* Board established by the Muslim Mosques and Charitable Trusts Act of 1956⁽⁶³⁾ till the appointment of a special Trustee by the *Wakfs* Board in 1983. According to Dr. Jaldeen even the Special Trustee appointed in 1983 has not been amenable to control by the *Wakfs* Board or the *Wakfs* Division as he has taken the initiative to introduce in Parliament a private

(60) See, Trust Ordinance No. 9 of 1917, as amended by Ordinances No4 of 1981 and 1 of 1934 and Acts No. 7 of 1968 and 30 of 1971 in particular Section 104, 106, 107, 108 and 110 which have been reproduced as Section 20, 21, 22, 23 and 24 respectively in the Muslim Intestate Succession and *Wakfs* Ordinance of 1934. the Cy - P res doctrine contained in section 92 (2) and provisions for the settlement of a scheme contained in Section 99 (3) of the Trust Ordinance have been copied into Section 5 of the Muslim Intestate Succession and *Wakfs* Ordinance.

(61) Dr. M.S.jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka* (1990), at page 325.

(62) *Marjan el al Burah el al* 51 NLR 34.

(63) *The Muslim Mosques and Charitable Trusts or Wakfs Act* No.51 of 1956 as amended by Act No 21 of 1962 and Act No 33 of 1982.

Members Bill to incorporate the Kataragama Shrine⁽⁶⁴⁾. But that is another story!

The inadequacies and shortcomings of the Muslim Intestate Succession and *Wakfs* Ordinance led to the appointment of a Special Committee in 1933 to frame rules for the efficient working of the Ordinance. The Committee made important recommendations with a view of remedying some of these pitfalls⁽⁶⁵⁾ but these recommendations were put into cold storage for two decades.

The Muslim Mosques and Charitable Trusts or *Wakfs* Act of 1956

In early 1950's, there was a great deal of agitation for the reform of the law on the lines suggested by the 1933 Committee. In July, 1952 the then Minister of Home Affairs appointed a Committee of Muslim Parliamentarians and Senators to examine the whole question afresh. On the basis of the report of this Committee, a bill was presented to the then House of Representatives and upon being passed by that body and the Senate became law as the Muslim Mosques and Charitable Trusts or *Wakfs* Act.⁽⁶⁶⁾ The act came into operation on 7th November 1956.

The preamble to the Act described it as :

“ An act to provide for the registration of Mosques, Muslim shrines and places of religious resort, to prescribe the powers, duties and functions of Trustees of Registered Mosques, Muslim shrines, places of religious resort and Muslim charitable trusts or Wakfs to establish a Muslim Charities Fund, to repeal Chapter II of the Muslim Intestate Succession and Wakfs Ordinance and to provide for matters connected therewith or incidental thereto”.

The different parts of the Act set out the objectives that the relevant provisions sought to achieve:

- Part I The staff and the *Wakfs* Board.

(64) Dr.M.S.Jaldeed, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka* (1990), at page 305.

(65) See, Sessional Paper No. 35 of 1935.

(66) The Muslim Mosques and Charitable Trusts or *Wakfs* Act No. 51 of 1956 as amended by Act No.21 of 1962 and Act No.33 of 1982.

- Part II Registration of Mosques.
- Part III Appointment, Power and Duties of Trustees of Registered Mosques and others.
- Part IV Application of provisions relating to Mosques, to thakkiyas, zaviyas, shrines (dhargas) Muslim shrines and places of religious resort
- Part V Muslim Charitable Trusts or *Wakfs*
- Part VI The Muslim Charities Fund.
- Part VII General.

The salient of the legislation be summarized as follows :-

- 1 - It set up office of a commissioner for mosques and Muslim Charities⁽⁶⁷⁾ who shall be Muslim and a *Wakfs* board consisting of seven Muslims members⁽⁶⁸⁾.
- 2 - The board was empowered to register all mosques⁽⁶⁹⁾ and mosques were to include thakkiyas, zaviyas, shrines (dhargas) and places of religious resort :
- 3 - Trustees of mosques were to be appointed by the board selected and / or elected by the jama'aath;
- 4 - No trustee was allowed to lease any property belonging to the *Wakfs* unless with the prior approval of the *Wakfs* board⁽⁷⁰⁾
- 5 - Any five persons could institute action before the district court making an order of specific performance or a declaration that the trustee is guilty of misfeasance, breach of duty or neglect of duty⁽⁷¹⁾ and if any or some of them withdraws from such action such could be continued irrespective of the withdrawal of such persons⁽⁷²⁾.
- 6 - All trustees of mosques and other places of religious resort and trustees of charitable trusts or *Wakfs* required furnishing periodic statements of accounts.⁽⁷³⁾

(67) Ibid, Section 2 (1).

(68) Ibid, Section 5 (1).

(69) Ibid, Section 13.

(70) Ibid, Section 20.

(71) Ibid, Section 29 (6).

(72) Ibid, Section 29 (9).

(73) Ibid, Section 27, 35 and 46.

- 7 - Every mosque and every Muslim charitable trust was required to make a contribution to the Muslim charities fund⁽⁷⁴⁾ which fund shall be utilized, inter alia, for the building and restoration of mosques as per section 45 (a) to (f);
- 8 - Sections 100 and 109 of the Trusts Ordinance⁽⁷⁵⁾ were specifically excluded from the operation of the ACT⁽⁷⁶⁾

The 1962 amendments

The practical difficulties that arose in the working of the 1956 ACT made it necessary for parliament to make certain amendments in the law. The main provisions of the Amending Act No. 21 of 1962 are noted below.

- (a) the delegation of power of the Wakfs Board to the Commissioner⁽⁷⁷⁾
- (b) Provisions effecting the registration of mosques⁽⁷⁸⁾
- (c) Provisions as to appointment of trustees⁽⁷⁹⁾
- (d) Powers of trustees to take disciplinary action against Katheeb and other employees of a mosque⁽⁸⁰⁾
- (e) Control over tills⁽⁸¹⁾
- (f) Suspension and removal of trustees⁽⁸²⁾
- (g) Definition of charitable trust⁽⁸³⁾ and
- (h) Legal protection to members of the Board acts done in good faith⁽⁸⁴⁾.

(74) 74 Ibid, Part VI of the Act read with the Schedule.

(75) 75 Trust Ordinance No. 9 of 1917, as amended by Ordinances No. 4 of 1918 and 1 of 1934 and Acts No. 7 of 1968 and 30 of 1971.

(76) .See, Section 55 of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.

(77) Ibid, Section 9A.

(78) Ibid, Section 13, 13A and 13 B.

(79) Ibid, Section 14.

(80) Ibid, Section 15 B.

(81) Ibid, Section 22A.

(82) Ibid, Section 29.

(83) Ibid, Section 32 (1) (d) to (f).

(84) Ibid, Section 57 A.

The 1982 amendments

Even more far-reaching amendments were included in Amending Act No 33 of 1982. Firstly, an amendment to the preamble of the Act clarified the application of “ whether incorporated or not ”. Until the amendment came into force, mosques incorporated under Acts of parliament, such as the Maradana Mosque, incorporated by Ordinance No. 22 of 1924, did not come within the purview of the Wakfs Act. The introduction of the amendment, therefore, comprehensively encompasses every mosque, shrine and religious resort in the country and brings them within the ambit of the Wakfs Act.

Secondly, the commissioner, who was the important individual from the point of view of administration under the earlier Act, was replaced by a public officer designated as the Director for Mosques and Moslem charitable Trusts. while under the previous law, the commissioner was the president of the *Wakfs* Board, under the amendment the chairman of the Board presided at every meeting and in his absence another member elected at such meeting functioned. The commissioner under the earlier law as president of the board had a deciding vote, but under the amendment, the chairman had such vote. A new section 9B has introduced whereby the board had powers to compel the attendance of witnesses, to compel production of documents and to administer oaths or affirmation.

The most innovative provisions of the amendment were sections 9D to 9J, which established the *Wakfs* Tribunal with both original and appellate jurisdiction. The original jurisdiction of th tribunal empowered it to make any order.

- (a) Removing from office any trustees of the trust or *Wakfs*;
- (b) Appointing, where necessary, a trustee or trustees for the trust or *wakf*;
- (c) Directing the submission of statements of accounts to the tribunal or the board;
- (d) (d) Declaring what proportion of the property of the trust or wakf or of the interest therein shall be allocated to any specified object of the trust or wakf;

- (e) Settling a scheme for the management of the trust or wakf;
- (f) Directing the specific performance of any act by the trustee or trustees of the trust or wakf
- (g) Declaring any trustee of the trust or Wakfs guilty of any misfeasance, breach of trust or neglect of duty;
- (h) Ordering the payment by any trustee of the trust or wakf of any sum to the funds of the trust or wakf by way of damages in respect of any misfeasance, breach of trust or neglect of duty; and
- (i) Granting such further or other relief arising from the matters specified in paragraphs (a) to (h).

However, the original jurisdiction of the Wakfs Tribunal could only be invoked with the approval of the Board⁽⁸⁵⁾ The tribunal had also appellate jurisdiction over any order or decision of the *Wakfs*. It can call for the record of any proceedings before the board and for the purposes of determining an appeal, hold inquiries and even admit further evidence, if necessary. Under section 9 H, the tribunal, on hearing an appeal, shall make suitable order confirming, setting aside or varying the order made by the board. According to section 55 A every order made by the Tribunal shall be deemed to be an order made by the district court and the provisions of the civil procedure code governing appeals from orders and judgments of the district courts shall, *mutatis mutandis*, apply though the references therein to a district court were references to the Tribunal. The court of appeal in the *ulahitiwela thakkiya* case⁽⁸⁶⁾ discussed the import of this new section 55 A. Sarath Silva J. in a well-reasoned judgment said: -

“This section contains two main elements. The first substantive in nature. It deems every order made by the Tribunal to be an order made by a district court. This will attract the provisions of section 23 of the judicature Act and the party dissatisfied with an order will have a right of appeal to this court. The second element is procedural in nature and it states that the provisions of the civil procedure code shall *mutatis mutandis* apply to and in relation to orders of the tribunal”.

(85) Section 9E (2) and (3) of Act No.33 of 1982.

(86) Court of Appeal Application No. CA 789/88 (unreported).

The members of the *Wakfs* Tribunal being appointed by the judicial service commission enjoy the status of judicial officers and are invested with the powers of a District court as to procedure. More importantly, the Tribunal is invested with exclusive jurisdiction in respect of matters relating to Muslim charitable trusts and *Waifs*, which precludes parallel procedures in other courts and tribunals. Section 55B deals with offences of contempt against the authority of the Tribunal.

Fourthly: The 1982 amendment introduced another innovative feature that was described by Dr. Jaldeen as the “democratization process”⁽⁸⁷⁾ Previously, the *Wakfs* board appointed trustees to mosques, including thakiyas, zaviyas, shrines (dhargas) and places of religious resort, having regard to: -

- (a) The terms of the instrument creating the trust;
- (b) The religious law and custom of the particular sect of the Muslim community concerned
- (c) The local custom of the particular mosque, and;
- (d) The practice and other arrangements in force for the administration of the mosque

The 1982 amendment conferred on the jama’ ath or other bodies recognised by the existing practices, rules, regulations or other arrangements the right to elect or otherwise nominate trustees who will be confirmed and appointed by the *Wakfs* board.

Section 14 (1) (a) as amended empowers the board to merely “confirm and appoint a person or persons to be trustee or trustees who is or have been selected or nominated according to the practices, rules and regulation or other arrangements in force for the administration of the mosque”. Section 58 defines, inter, alia, the jama’ ath as “in relation to a mosque to mean the persons who ordinarily worship at or participate in the religious or customary rights and ceremonies of that mosque and whose name appears on the register of members of the mosque for the time being”. Alternatively, if no such selection or nomination has been

(87) Dr.M.S.Jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka* (1990), at page 340.

done, the trustees may be appointed by the board but they should be members of the jama' ath. The board may also appoint a 'special Trustee' where necessary or expedient for the proper administration of a mosque. Under this subsection such special trustees need not be members of the jama' ath of the particular mosque.

It is noteworthy that in regard to a *wakf* that is not a mosque, thakkiya, zavia shrine (dharga) or other place of religious resort registered under part II or IV of the Act, questions relating to the settling of schemes of management, devolution of trusteeship and administration fall to be determined by the *Wakfs* Tribunal having regard to "the instrument, if any, by which such trust or *wakf* has been created, the religious law and custom of the sect of the Muslim community concerned, the local custom with reference to such trust or *wakf*, and the practices and other arrangements in force for the administration of such trust or *wakf*"⁽⁸⁸⁾.

Fifthly, the amendment provides for the appointment of authorized officers operating under the instructions of the Director to investigate and report to the board their findings and, where necessary, institute and defend an action or proceeding before the board, the tribunal or in any court of law. These officers also have the power to institute action before a competent court. Section 58 defines an authorized officer as "an officer authorized to act as such for the purposes of this Act".

An important institution under the Sri Lankan statute is the Muslim Charities Fund. This fund has been established in terms of part VI of the Act and is administered by the *WAKF* Board⁽⁸⁹⁾. Section 45 sets out the purpose for which moneys out of the fund may be expended, the more of which, inter alia, are the building, restoration and maintenance of mosques (the intention being to assist poorer mosques from the incomes of the richer ones), relief of the poor among Muslims, advancement of education of Muslims and the advancement of Islam., However, it would safely be said that not much of these objectives have been realized. Some

(88) Section 41 of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.

(89) See, Sections 43, 44 and 45 of the Muslim Mosques and Charitable trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.

minor expenditures have been made, but whether these have even minutely realized the objectives under the Act is questionable. Dr. Jaldeen observes that “ there are several reasons for this state of affairs. Firstly, it could be that if the accounting sector of the Act (i.e ensuring proper, prompt and accurate accounting procedures by the mosques and the other religious places registered with the *wakf* board) is strengthened and made effective, the inflow into the fund would be substantial. Secondly, as arising from improper or delayed submission of accounts, the position of the fund is not known even to the officials of the department. The accounts are in arrears for a substantial period of time. No details are available for even updating the accounts. Nor has it been audited for many years. Thirdly, if this state of affairs is allowed to be continued, the purposes and objectives envisaged under the Act, as regards the Fund, would soon be a dead letter”⁽⁹⁰⁾.

There are several solutions to these problems. One would be to establish a small committee, preferably consisting of qualified accountants whose primary task would be to update all accounts for the years in which they are in arrears with the available data. This committee should be given guidelines and a time schedule to finalize this work. Another step would be, ancillary to the first, to set up within the *wakf* Division, an accounting division preferably headed by a qualified accountant (whose salary could be paid out of the fund). There may be constraints to obtain an accountant from the governmental cadres, in which case the head of the accounting division suggested could be on a part-time basis until the arrears are completed. During that period the permanent staff handling the accountants could have also received considerable training in the work. The accounting division should not only clear up the arrears in maintenance of accounts but also follow up and collect the arrears due from mosques by way of their contributions to the fund. The suggested accounts division should be a permanent branch of the *Wakf* Division. A reputed firm of Auditors preferably should carry out the audit of these accounts. Thereafter, all accounts should be forwarded for the Board’s scrutiny and approval on a monthly basis.

(90) Dr.M.S.Jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka* (1990), at page 347.

Evaluation of the existing law and institution

M.M.M. Mahroof⁽⁹¹⁾ refers to the *Wakfs* Act as administrative document which “skirts the definition of even the words which are crucial in discussing *wakf*. He points out that, unlike the corresponding Indian legislation, the Sri Lankan statute does not even contain a definition of the term *wakf*. However, it is clear from the structure of the *Wakfs* Act that it equates waqf to the English law notion of “charitable trusts” which has been defined in section 32 in the following way:

“ 32” (1): The provisions of this part shall apply to every Muslim charitable trust or *wakf* created for all or any of the following purposes other than a Muslim charitable trust or *wakf* which is solely for the benefit of a registered mosque: -

- (g) The relief of poverty among Muslims or any section thereof;
- (h) The advancement of education of Muslims or any section thereof;
- (f) The advancement of Islam generally;
- (j) The management of any mosque or Muslim shrine or place of religious resort or the performance of religious rites or practices at such mosque, shrine or place or any other place whatsoever ;
- (g) Any purpose beneficial to Muslims or any section thereof; and,
- (h) Any other purpose recognized by Muslim law as religious, pious or charitable”.

A wakf created for any of the purposes outlined above other than that or a registered mosque is deemed a charitable trust and comes within the ambit of the section. It appears that the management of a mosque or other place of religious resort not registered under part 11 or IV of the Act would be treated as charitable trust and be deemed to fall within the definition of trust, or waqfs and subject to administration under the provisions of part V of the Act.

It will be noticed that with the exception of section 32 (1) (f), the above quoted section echoes the definition found in section 99 of the trust

(91) M.M.M. Mahrooff, the Muslim Mosques and Charitable Trusts of Wakfs Act: Some Lexical Aspects Meezan (1980) Unfortunately, this issue of the journal does not bear page number.

ordinance⁽⁹²⁾. Furthermore, as Mahroof points out “the trustee in the Wakfs Law of this country has been assimilated to the trustee under the trust ordinance and consequently to the position of the trustee in English law”. An important characteristic of English law is that the trustee is the owner of the property subject to the trust although his ownership is not absolute and is subject to the beneficial interest of the beneficiary. On the other hand according to Islamic law a mutawalli is not the owner of the *Wakfs* property and merely manages the same for the common good in the name of Allah. His duties bear a threefold character of legal, moral and religious obligation. While the drift in our law towards English concepts have been attributed to the emergence of a land owning or mercantile elite and the recognition of mosque trusteeship as visible symbol of elitism a return to the traditional concepts of Islamic law be suggested as a means of overcoming the strife and unpleasantness associated with contemporary trust management⁽⁹³⁾.

Section 14 of the Wakfs Act deal with the appointment of trustees of mosques. The term *mosque* has been defined so as to include *any place of exclusive Muslim worship* and the term encompasses any thakkiya or zavia, whether affiliated or unaffiliated to any mosque. In *S.Y. Issadeen v. M. I. M. Atheek et al*⁽⁹⁴⁾ the question arose whether a scheme of management has been approved by court under the earlier ordinance of 1931, it is necessary to seek approval of the filling of any vacancy of a deceased trustee by filing a new action in terms of section 39 of the *Wakfs* Act of 1956. The supreme court invoked section 6(3) of the Interpretation Ordinance and held that the new Act was meant to apply to a proceeding relating to a Muslim Charitable Trust which had commenced when there has been no order or decree made by a court earlier relating to such a trust.

The case of *M.H.M. A Cader and others v. Commissioner of Mosques and Muslim Charitable Trusts*⁽⁹⁵⁾ involved the Kalmunaikudi Jumma

(92) Trust ordinance No. 9 of 1917, as amended by ordinances No. 4 of 1918 and Acts No. 7 of 1968 and 30 of 1971.

(93) See, Saleem Marsoof, Muslim Charitable Trusts and Religious Institiutuisn in Sri Lanka, (1993) Vol IV, Issue No. 65 Law and Societ Trust Fortnightly Review, 4 at page 10.

(94) 70 NLR 159.

(95) 66 NLR.

mosque to which trustees had to be appointed consequent to its registration. The *Wakfs* Board had sought and received the recommendations of Mr. M. C. Ahamed, a member of parliament then. Mr. Ahamed had recommended several names including his own. The board appointed all the nominees of Mr. Ahamed. The appointments were challenged by the prerogative writ of *mandamus*, which was allowed by the Supreme Court. The court held that the *Wakfs* Board exercised a statutory duty imposed by section 14 which, though discretionary, they had to exercise personally. The court held that in exercising that discretion the *Wakfs* Board couldn't abdicate its judgment in favor of anyone else "however competent, honorable or efficient that person may be". The appointments were therefore quashed and, more importantly, the members of the *Wakfs* board were ordered to pay costs in a sum of 250 guineas.

Another important decision which concerned the Dewatagaha mosque, was *N. M. Ishak et al v. I.L.M Thowfeek and another*⁽⁹⁶⁾ decided by the Judicial Committee of the Privy Council. Lord Pearson who delivered judgment held that the *Wakfs* Board had discretion in the matter of appointing trustees to mosque. His lordship stated: -

" If there was no discretion, a case could arise in which the board would be bound to appoint as trustee of a mosque person who is utterly unsuitable in all respects. A construction of that subsection leading to that result would be unreasonable and contrary to the public interest and should therefore be rejected if the other construction allowing the board to have discretion is tenable according to the language of the subsection. In fact this other construction is not only tenable but also indicated by the language of the subsection. If the intention had been to make the four matters stated in paragraph (a), (b) (c), and (d) conclusive, or the only admissible factors among that would have been provided. The requirements that the board shall 'have regard' to certain tends in itself show that the Board's duty in respect of these matters is limited to having regard to them. They must take them into account and consider them and give due weight to them, but they have an ultimate discretion and are not bound to select a person or persons who they consider unsuitable".

(96) 71 NLR 101.

Therefore the appointment of a person who was not a male descendent of the creator of the *Wakfs*, in spite of express provisions in the trust instrument, was valid since the *Wakfs* Board had a discretion in the appointment and can overlook even an express provision in the instrument creating the *Wakfs* if such person as named in the deed is unsuitable to be appointed as a trustee of the mosque.

As noted earlier, the 1982 amendment to the *Wakfs* Act gave greater impetus to the jama' ath or other established body in regard to the selection of trustees. With regard to mosque, thakkiyas, zaviyas and shrines the majority of the disputes that arise concern the selection or nomination of trustees. One problem is that the practices, rules, regulations and other arrangements in force for the administration of a particular mosque or other institutions are not easily ascertainable. The practices rules, rules, regulations and other arrangements should be certain, express and specific. The practices and other arrangements in a mosque or other institutions may be difficult to ascertain and to prove. In the case of new mosques and other institutions, it is easier to insist upon the drafting of a constitution that would spell out the mode of the selection of trustees. There should be a model constitution available at the *Wakfs* division to assist those who are in the process of drafting a constitution.

Section 14 (1) of the Act provides for the appointment of trustees as soon as maybe after a mosque or other institution has been registered under Section 13". The appointment of trustees is a continuing process and this section will also apply to subsequent appointment of trustees. According to Section 14 (1) (a) *Wakfs* Board shall confirm and appoint trustees selected or nominated in accordance with the relevant practices, rules and regulations and other arrangements by the jama'ath. Although there is no specific reference to the election of trustees, election is a more suitable and democratic process than selection and is the most popular method or choosing trustees for appointment. Unfortunately, however, the power conferred on the *Wakfs* Board by Section 14 (c) to appoint Special Trustees in circumstances where trustees cannot be appointed in accordance with the existing practices, rules, regulations or arrangements, have been used to subvert this democratic process. A good illustration is the Dehiwela Muhiyyaddeen Grand Jumma Mosque, the Constitution of which provides for the election of trustees by the jama'ath once biennially,

but no jama'ath meeting has been held since 1982. Representations have been made in this connection to the *Wakfs* Board from time to time but to no avail. In 1987, after revoking the *extension* granted by it to the incumbent trustees, the *Wakfs* Board appointed three Special Trustees to revise the jama'ath Register and summon a jama'ath meeting to elect trustees⁽⁹⁷⁾. Although the *Wakfs* Tribunal in case No. W/TRIB/06 dismissed the appeal against the said order, and the Special Trustees did take over the interim administration after some initial setbacks, neither they nor the succeeding Special Trustees have been able to even summon a jama'ath meeting!

In this context, a question of some difficulty is the meaning of the phrase 'registered members of the jama'ath'. In Section 38 the term jama'ath is defined to "meet the persons who ordinarily worship at or participate in the religious or customary rights and ceremonies of that mosque and whose names appear on the register of members of the mosque for the time being." Dr. M.S.Jaldeen asks.

"Who is the competent authority which decides that a person should be entered as a member in the jama'ath register? What are the criteria and /or the qualifications to become a member of the jama'ath? Is to be based on residence and / or proximity and /or participation and /or worship? Or is it that a member shall be included only if he pays regular subscriptions? Is a member's age dependent on his reaching the age of majority or all males above the age of puberty? Or is it, if based on residence, the chief householder, if a male? Does it include other males in the same household? What about temporary residents? As in the case of public servant on short transfer, are trustees entitled to lay down guidelines as to who are qualified to be a member of the jama'ath? There have been instances where only a person belonging to a particular *thareeqa* was included in the jama'ath register of a zavia. The trustees shut out a father and included a son on the basis that it is the son, not the father, who belonged to the *thareeqa*."⁽⁹⁸⁾

These are the very issues that have given rise to so many disputes, and can be avoided by making express provisions in the constitutions of

(97) Vide order dated 1th March 1987 in WB/142/86.

(98) Dr.M.S. Jaldeen, *The Muslim Law of Succession Inheritance& wakf in Sri Lanka* (1990), at page 343.

mosques and other institutions whenever possible. Although the post of a trustee of a mosque is very important office and his duties and functions are of vital importance in the administration of a mosque, yet, the Act does not define his qualifications, whether religious, educational or property-wise. According to Minhaj et Talibin⁽⁹⁹⁾ a trustee should be a person “of irreproachable character, fit for his duties physically and mentally”. A method should be evolved to prepare guidelines setting out minimum educational and other qualifications for trustees.

The difficulty in effecting a smooth transition of the possession of the movable properties of a mosque from the previous incumbents in office to the newly appointed trustees was another problem which not only hindered mosque administration but, in some instances, caused a deadlock in the functioning of the mosque. Section 15A deals with the duty of a person or persons in charge of property belonging to a mosque. Section 15A (4) dealing with recovery of money is unambiguous. Upon the Director filing a certificate before the relevant Magistrate’s Court, that court recovers the money due by way of fine. The same cannot be said of section 15A (3) that relates to recovery of movable and immovable property. The subsection is loosely drafted. This section provides that “where any person fails to deliver possession of....any property other than money, specified in a notice served on him... the Director, if directed.... by the Board shall, on making an application in that behalf to the Magistrates Court... be entitled to an order of that court directing the Fiscal to deliver possession....”

As Dr Jaldeen pints out, an application for writ is available only on a valid decree of that court. It could be construed that an application by the Director does no entitle him to an order forthwith directing the Fiscal to execute something because an application does not *per se* entitle him to an order directing the Fiscal to act. Dr. Jaldeen suggests an amending provision in the following lines:-

“Where any person fails to deliver possession of or hand over to the trustee or trustees of a mosque any property... specified in a notice served

(99) Nawawi, Minhaj et Talibin, A manual of Muhhamadan Law, (1992) Book 23, Section1.

to him... within the period specified in that notice, the Director, if directed so to do by the Board shall file a certificate... to a Magistrate's Court having jurisdiction over the premises or property where the land is situated..., or where such person resides if such property is immovable property and such certificate shall be deemed to be a decree to recover possession and/ or to pay money entered by such court on the date of such registration of the certificate."

In any event, the provisions of section 15A would not apply to the recovery of property or money being the subject matter of a *wakf* which is not a mosque or other place of religious resort governed by Part 11 or 1V of the Act. In such a case relief may be sought only by invoking the jurisdiction of the District Court as provided in Section 39 of the Act. The difficulty with this is that the process before the District Court is extremely slow and could take decades for successful completing. Furthermore, the proceedings could be initiated in the District Court only by the Director for Mosques and Muslim Charitable Trusts or *Wakfs* upon a directive given by the *Wakfs* Board, or by any interested party with a certificate issued by the Director that the action has been approved by the Board. Given the complexion of the *Wakfs* Board and problems arising from its centralized structure, inadequate staffing and heavy workload, this provision makes it almost impossible to recover property or money belonging to the *wakf*

Although since the Act of 1956 it is a duty incumbent on trustees to keep accounts, maintain inventories and submit half-yearly accounts. These are usually observed in the breach. Dr. Jaldeen observes that -

"There is a hassle and tussle to be appointed trustees, but once appointed this important aspect of their duties is simply ignored. Because no accounts at all are usually maintained, some times made available at the end of their term of office and new elections or selections are round the corner. There are instances when the trustees have been pushed out of office with no accounts maintained, nor books of accounts available. Some method of compelling periodic submission of accounts should be evolved with penal provisions or even surcharges for non-submission of accounts. Alternatively, failure to provide accounts during two concurrent half-year periods should be treated as a valid ground for removal from the office of a trustee. More effective follow-up procedures should be

evolved preferably with staff trained in accountancy to handle this particular aspect of waqf administration.⁽¹⁰⁰⁾

A question of a fundamental nature which arises in the wake of the Thirteenth Amendment to the Constitution is whether the administration of Muslim Charitable Trusts, mosques and religious institutions could be improved by having separate *Wakfs* boards and *Wakfs* tribunals for each Province. With so many mosques, thakkiyas, zavioras and other institutions found in every nook and corner of the island, it would certainly be more convenient to all concerned to have the aforesaid boards and tribunals in the provincial capitals and other important towns. It will also enable closer qualitative administration and supervision.

Conclusions

The concept of *Wakfs* may be described as one of the greatest achievements of Islamic jurisprudence. It has immense socio-economic potential in the development and the economic advancement of nations. In Sri Lanka, an administrative regime has been developed over the years for the regulation of *Wakfs*, and a certain amount of legal development has also taken place. However, the utilization of the institution has not been optimised to a satisfactory extent.

It is suggested that with a view of maximizing the socio-economic impact of the institution of *Wakfs*, an endeavour should be made to

- a) Educate the Muslims of Sri Lanka of the possible benefits of the institution.
- b) Remove the obstacles, both conceptual and practical, that hinder the utilization of the institution.
- c) De-politicise the institution and its administrative machinery and ensure that only those competent to discharge their onerous duties to Allah are vested with responsibility as trustees or as administrators.
- d) Improve accounting procedures and facilitate investigations against errant trustees or officials, and
- e) De-centralise the administrative machinery on a provincial basis so that there can be closer supervision of mosques and charitable trusts or *Wakfs*.

(100) Dr. M.S. Jaldeen, *The Muslim Law of Succession Inheritance & Wakf in Sri Lanka* (1990), at page 346.