

**Sharī'a under the English Legal System in British India:
Awqāf (Endowments) in the Making of Anglo-Muhammadan Law**

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Abstract

This study analyses the treatment of Islamic law (*Fiqh*) under the English legal system by looking into the developments in waqf law in British India. It has the dual objective of analysing the impact of the English legal system upon Islamic law, and determining the role of various actors in this process. It argues that waqf law was transformed in order to fit into the state structure. The colonial state used the techniques of translation, adjudication, legislation and teaching in order to transform Islamic law. Adjudication was preferred over legislative codification as a mode of governance and rule making because of its flexibility. The translation of classical Islamic legal texts, the *Hidāya* and certain parts of the *Fatāwā al-‘Ālamgīriyya*, relieved English judges of the need for a reliance on local legal advisors. However, Muslim lawyers, judges, legal commentators, and some religious scholars (*‘ulamā’*) simultaneously collaborated and negotiated with, and resisted colonial administrators in the process of legal transformation. As adjudication was a preferred mode of transformation, legal commentaries played a crucial role in legal developments. A majority of legal commentators were Muslims, such as Ameer Ali, Abdur Rahim and Faiz Tyabji. They used their legal treatises to resist any colonial intervention in Islamic law.

Although English educated Muslims replaced *‘ulamā’* as cultural intermediaries between the state and society, this did not eliminate the role of *‘ulamā’* as the custodians of Islamic law. They established closer links with society and issued *fatāwā* (legal opinions) on legal issues. *Fatāwā* were sought regarding every important aspect of waqf law, from the validity of family awqāf to the management of awqāf and the permissibility of awqāf of movables such as shares of companies. *‘Ulamā’* also lobbied for the enforcement of Islamic law in order to promote women’s rights of inheritance and to get a divorce. This study finds that Anglo-Muhammadan law was a product of interaction between various sections of Muslim society and colonial administrators. It reflected the socio-political context of colonial India and the process of negotiations between divergent interest holders. Despite replacing the traditional institutional structure, the overall legal system became more inclusive. It could interact with various stakeholders and represent them in the process of law making in order to respond to social change.

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Dedication

To my teachers and parents

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Note on Transliteration and Translation

This work relies on sources available primarily in English, Arabic, Urdu, and to a limited extent in Ottoman Turkish. The transliteration system of the *Oxford Journal of Islamic Studies* is followed. At times a single expression is described differently in these languages, for example waqf (Arabic), wakf (Urdu) and vaqf (Ottoman Turkish). Generally, Arabic transliteration is preferred for the sake of consistency.

Anglicisation of non-English plurals is avoided as far as possible. Therefore, ‘awqāf’ is used instead of ‘waqfs’ for the plural of a waqf. Names of earlier Muslim jurists are transliterated, but not the names of later scholars such as Ameer Ali, Abdur Rahim, Tyabji, Mulla and Fyzee.

The names of books and their translations have been given as they appear in the original print. The names of parties to the case have been given as they appear in the reported judgment. It must be noted that some law reports omit prefixes such as Nawab, Mussamat, Sardar, Syed, Mirza, Sheikh, Haji, Khan Bahadur and Sir. Sometime a single name is spelt differently at various stages of a court case. I have tried to remain consistent by providing prefixes in brackets wherever possible.

Sharī‘a and *Fiqh* are translated under the generic terms of Muhammadan law or Islamic law. Difference in their historical usage is explained in the Introduction. It must be noted that various authors spelt the expression ‘Muhammadan’ differently such as ‘Moohummudan’, ‘Mohammedans’, ‘Mohamedan’, or ‘Mussalman’. Gradually, uniform spellings ‘Muhammadan’ were adopted.

Translation of excerpts from different languages into English is mine unless otherwise indicated. Words appearing in quotations have not been transliterated.

The Oxford University Standard for Citation of Legal Authorities (OSCOLA) fourth edition is followed for references. Frequently used Arabic words such as waqf (plural awqāf) have not been italicised.

Abbreviations

Published Law Reports

AC	Appeal Cases (Eng)
AIR All	All India Reporter Allahabad
AIR Bom	All India Reporter Bombay
AIR Cal	All India Reporter Calcutta
AIR Lah	All India Reporter Lahore
AIR Mad	All India Reporter Madras
AIR Nag	All India Reporter Nagpur
AIR Oudh	All India Reporter Oudh
AIR Pat	All India Reporter Patna
AIR Pesh	All India Reporter Peshawar
AIR PC	All India Reporter Privy Council
AIR Rang	All India Reporter Rangoon
AIR Sind	All India Reporter Sind
ALJ	Allahabad Law Journal
ALJR	Allahabad Law Journal Reporter
All ER	All England Reports (Eng)
All HC	North-Western Provinces High Court Reports, Allahabad
AWN	Allahabad Weekly Notes
BHC	Bombay High Court Reports
BLJ	Bombay Law Journal
BLR	Bombay Law Reporter
Beng LR	Bengal Law Reports
CLJ	Calcutta Law Journal
CLR	Calcutta Law Reporter
CWN	Calcutta Weekly Notes
De G F & J	De Gex, Fisher & Jones, temp Campbell
EACA	Eastern Africa Court of Appeal Law Reports
ER	English Reports (Eng)
Fulton	Fulton's Reports
IA	Law Reports Indian Appeals (Eng)
IC	Indian Cases
ILR	Indian Law Reports
KB	King's Bench (Eng)
Mad LJ	Madras Law Journal
PR	Punjab Record
PWR	Punjab Weekly Reporter
MIA	Moore's Indian Appeals
NLR	National Law Reports (Ceylon)
NWP	North-West Provinces High Court Reports
OWN	Oudh Weekly Notes
SCR	Supreme Court Reports (Bengal)
SDA	Sudder Dewanny Adawlut (Bengal)
Sel Rep	Selected Reports, Sudder Dewanny Adawlut (Bengal)
SWR	Sutherland's Weekly Reporter

TLR Times Law Reports (Eng)
WLR Weekly Law Reports (Eng)
WR Sutherland's Weekly Reporter

Archives

IOR India Office Records
L/PJ Public and Judicial Department Records 1795-1950
IOR/E East India Company: General Correspondence 1602-1859
IOR/V India Office Records Official Publications Series c1760-1957
LI Lincoln's Inn Library, London. Case Records submitted with appeals to the Judicial Committee of the Privy Council.
PILC Proceedings of the Imperial/Indian Legislative Council/Council of the Governor General of India
HCPP House of Commons Parliamentary Papers

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Introduction

This thesis explores the formation of Anglo-Muhammadan law by looking into the developments in waqf law under the English legal system. Anglo-Muhammadan law was the result of the interaction between substantive Islamic law and procedural English law in British India.¹ The interaction between Islamic law and English law was a unique historical development. However, a systematic study of this interaction, which culminated in the formation of a hybrid legal system that still prevails in most of the Muslim world, has yet to be undertaken. This study fills this gap in the current scholarship by exploring this historical interaction, which spread over more than a hundred and fifty years between the end of the eighteenth and the second half of the twentieth centuries. This thesis has the dual objective of analysing the impact of this interaction upon Islamic law, and determining the role of various actors in the process. In order to achieve these objectives, both the law in books and the practice of waqf in real life are taken into account by analysing a wide range of literature including classical *Fiqh*² texts, court cases, legal commentaries, official archives, and the *fatāwā* (legal opinions) of *'ulamā'* (religious scholars).

¹ This law was later transplanted to other parts of the British Empire in the Middle East and Africa,

² *Fiqh* literally means understanding. It denotes the meanings of human interpretations of *Sharī'a*, which is contained in the *Qur'ān* and the *Sunna* of the Prophet Muḥammad (peace be upon him). Whereas *Sharī'a* is all encompassing covering both beliefs and legal injunctions, *Fiqh* is limited to human actions. The founder of the Ḥanafī school, Abū Ḥanīfa defined *Fiqh* as the knowledge of rights and obligations. Later jurists drew a distinction between *Sharī'a* and *Fiqh* in terms of the generality and immutability of the former and the specificity and adaptability of the later. 'Ubayd Allāh ibn Mas'ūd Maḥbūbī, *Tawḍīḥ ma'a al-talwīḥ* (al-Maṭba'a al-Impīrāṭūriya 1884) 11-12. MK Masud, *Shatibi's Philosophy of Islamic Law* (Islamic Research Institute, Islamabad 1995) 18-20. *Sharī'a* and *Fiqh* are used interchangeably in this thesis unless specified otherwise.

It is argued here that the changes brought into waqf law under British colonialism through judicial and statutory processes can be understood in the context of modern state formation.³ The classical waqf did not fit into such binary categories as public or private and secular or religious, though it did recognise such categorisation to a certain extent.⁴ The classical *Fiqh* texts made a distinction between *waqf khayrī* (charitable) and *waqf ahlī* (family). The former was sometimes described as *waqf ‘ām* (public) and the latter as *waqf ‘alā al-awlād* (in favour of children). Religious and mundane considerations could be found in both types, but legal theory sanctified waqf by regarding God as the owner of waqf property that could not be subjected to private ownership. British judges and legislators had to ‘transform’ *Fiqh* in order to accommodate waqf within the new state structure. This study shows that the whole process of transformation of waqf related *Fiqh* rules took place with an active involvement of Muslim lawyers, judges, legal commentators, politicians, and to a certain extent of *‘ulamā’*. Various classes of Muslims, despite having divergent views and interests, actively participated in the formation, interpretation and extension of waqf related laws. They simultaneously collaborated and negotiated with, and contested the British colonial administrators in this process. Ordinary Indian Muslims

³ It is hard to find an agreed definition of ‘state’. Max Weber famously defined a state as ‘a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.’ M Weber, ‘Politics as a Vocation’ in HH Gerth and CW Mills (eds), *From Max Weber: Essays in Sociology* (OUP 1957) 78 (italics original). The use of two expressions ‘monopoly’ and ‘legitimate use’ makes this definition problematic because they require further clarification. Douglass North proposes an alternative definition: ‘A state is an organisation with a comparative advantage in violence, extending over a geographic area whose boundaries are determined by its power to tax constituents.’ DC North, *Structure and Change in Economic History* (Norton 1981) 21. An indepth analysis of the concept of ‘state’ from historical and philosophical perspectives is beyond the scope of this study. For such an analysis see J Bartelson, *The Critique of the State* (CUP 2001). Also see footnotes no 5 and 7 below.

⁴ M Hoexter, ‘Ḥuqūq Allāh and Ḥuqūq Al-‘Ibād as Reflected in the Waqf Institution’ (1995) 19 Jerusalem Studies in Arabic and Islam 133.

followed developments in case law and legislation in order to protect their interests by adjusting their awqāf within the newly developing legal system.

These findings are primarily based on the analysis of cases decided by the Judicial Committee of the Privy Council, along with the wider legal discourse found in the judgments of various Indian High Courts, legal commentaries, scholarly articles, legislative debates, official archives and relevant *fatāwā* issued by '*ulamā*'. It is worth noting that developments in Islamic law (*Fiqh*) were also taking place outside the British judicial and legislative institutions during the period covered under this study.⁵ The scope of this thesis however is limited to the developments that were taking place at the judicial and legislative levels. It engages with the wider pluralistic legal discourse only to the extent that it affected the legal discourse that culminated in the form of formal law, named as Anglo-Muhammadan law.⁶

Legal anthropologists and historians have noted the transformation in the nature of *Sharī'a* under colonial rule in India. During this period, they argue that *Sharī'a* was transformed from a communitarian regulation, based on moral norms, into a state law backed by sanction for non-compliance. This does not mean that *Sharī'a* did not envisage operating within a politically organised system. Rather it required the existence of an institution for the execution of its injunctions. Such an

⁵ Dār ul 'ulūm Deoband, Ahl-i-Ḥadīth, the Bareilwis, Aligarh University, and the Nadwat ul 'ulamā' of Lucknow represented various schools of thought prevalent amongst Indian Muslims in the nineteenth and twentieth centuries. BD Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* (Princeton University Press 1982); MQ Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton University Press 2002) 17-37.

⁶ I am grateful to Professor Werner Menski for drawing my attention to the wider context in which Anglo-Muhammadan law was developing.

institution existed in the form of the Caliphate, wherein a Caliph was given authority with the consensus of the community.⁷ In classical Islamic political thought, the relationship between the ruler and community was contractual. But unlike their Western counterparts, Muslim jurists did not expressly recognise the concept of juristic personality for the state and only natural persons could have rights and obligations under *Sharī'a*.⁸ The modern nation state as an impersonal entity run by a bureaucracy and having an absolute monopoly on law making and the exercise of violence is a relatively new phenomenon for *Sharī'a*.⁹

Paradoxically, in British India while the scope of *Sharī'a* was limited to personal and family matters, it was rigorously applied by state institutions in an unprecedented fashion.¹⁰ In pre-colonial India, the application of *Sharī'a* was context specific and a *qāḍī* never applied the principles of *Sharī'a* in the way the judges of English courts applied the law. This difference in the mode of the application of the principles of *Sharī'a* had long-term consequences in the further development of legal principles. Whereas the decision of a *qāḍī* was specific to the facts of a case and it did

⁷ L Binder, 'Al-Ghazālī's Theory of Islamic Government' (1955) 45 *The Muslim World* 229, 234; MM Rabi, *The Political Theory of Ibn Khaldun* (Brill 1967) 145. SA Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Brill 1996) xxxv-xviii. P Crone, *Medieval Islamic Political Thought* (Edinburgh University Press 2005) 393-98.

⁸ BG Weiss, *The Spirit of Islamic Law* (University of Georgia Press 1998) 181.

⁹ WB Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press 2013) chapter 2, 'The Modern State', 19-36. I Ahmad, 'Genealogy of the Islamic State: Reflections on Maududi's Political Thought and Islamism' (2009) 15 *Journal of the Royal Anthropological Institute* S145. The transformation of legal fiction of the corporate body of the king to the separate personality of corporate aggregate of a state is a remarkable development under Western legal thought. J McLean, *Searching for the State in British Legal Thought* (CUP 2012) 19-51; Q Skinner, 'A Genealogy of the Modern State' (Proceedings of the British Academy 2009) 325-70.

¹⁰ In the Malaysian context, Horowitz calls this process as 'legalization of Islam' and not 'Islamization of law'. DL Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change' (1994) 42 *The American Journal of Comparative Law* 233, 257.

not contribute to the development of law, the decisions of superior courts had the authority of law under the doctrine of precedent. Thus by installing a hierarchical judicial system in India, the British created machinery that could keep on developing law with the passage of time and change of circumstances. This was a fundamental departure from the Islamic legal tradition wherein a *qāḍī*, as an official of the state, had no role in law making.¹¹

Traditionally, the sole custodians of *Sharī'a* were '*ulamā*' or more specifically '*fuqahā*' (jurists), who tried to keep themselves independent of state authority.¹² This does not mean that there was an absolute separation between rulers and '*ulamā*'. '*Ulamā*' often took government offices as administrators, but throughout Islamic history they generally tried to maintain their independence from rulers and associated themselves with the community.¹³ They represented the moral authority which counter balanced the political power of rulers. Despite claiming the right to leadership, both religious and political, Muslim rulers never assumed the right to legislate in areas covered by *Sharī'a*. In contrast, they enjoyed enormous powers in public administration. Their authority was supported under the doctrine of *Siyāsa al-*

¹¹ *Qāḍīs* played an important role in the development of Islamic law both in its early history and in the later period especially in accommodating custom into substantive law. However, generally the role of a *qāḍī* in the development of Islamic law was limited. M Hoexter, 'Qāḍī, Muftī and Ruler: Their Roles in the Development of Islamic Law' in R Shaham (ed) *Law, Custom, and Statute in the Muslim World* (Brill 2007) 67-85.

¹² This has led some scholars to characterise *Sharī'a* as 'jurists' law'. R Peters, 'From Jurists Law to Statute Law or What Happens When the Shari'a is Codified' (2002) 7 *Mediterranean Politics* 82; L Aharon, 'The Transformation of the Sharī'a from Jurists' Law to Statutory Law in the Contemporary Muslim World' (2004) 44 *Die Welt des Islams* 85; WB Hallaq, 'Juristic Authority vs. State Power: The Legal Crises of Modern Islam' (2003) 19 *Journal of Law and Religion* 243, 245.

¹³ '*Ulamā*' were quite often forced by rulers to accept the office of a *qāḍī*. Muḥammad ibn Yūsuf Kindī, *The Governors and Judges of Egypt, or, Kitāb el 'umarā' (El wulāh) wa Kitāb el Quḍāh of El Kindī* (Brill 1912); NJ Coulson, 'Doctrine and Practice in Islamic Law: One Aspect of the Problem' (1956) 18 *Bulletin of the School of Oriental and African Studies, University of London* 211.

Sharī'a (government in accordance with *Sharī'a*), which was a reflection of the equilibrium between the religious authority of '*ulamā*' and political authority of rulers.¹⁴ However, there was a caveat. Powers exercised under this doctrine were regarded as extraordinary and temporary.¹⁵ The ordinances of a ruler could never attain a permanent status attributed to the injunctions of *Sharī'a*, which was not only sacred but also permanent. Therefore, under ordinary circumstances, the political and moral domains represented by rulers and '*ulamā*' respectively performed parallel functions in coordination with each other.¹⁶ This was a symbiotic relationship because the competing authorities of rulers and '*ulamā*' were interdependent.¹⁷ However, as was the case in pre Reformation England regarding papal and royal jurisdictions, the relationship between '*ulamā*' and rulers remained in a state of flux throughout the history of Islam.¹⁸ Further, as there could be multiple claimants to political authority, there was also diversity within '*ulamā*' as a class. In addition, *ṣūfiyā*' (saints/mystics)

¹⁴ MK Masud, 'The Doctrine of *Siyāsa* in Islamic Law' (2001) 18 *Rech van de Islam* 129; MH Kamali, '*Siyāsa*h *Sharī'yah* or the Policies of Islamic Government' (1989) 6 *The American Journal of Islamic Social Sciences* 59. The formal superiority but actual limited scope of state law was a common element in traditional legal systems of Asia and Africa in pre-colonial period. WF Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (CUP 2006) 22-23.

¹⁵ In the Ottoman Empire, the decrees of a ruler were valid during his lifetime. In practice, they were confirmed by the successive ruler. VLM Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Clarendon Press 1973) 172.

¹⁶ Masud, *Shatibi's Philosophy of Islamic Law* (n 2) 15; S Zubaida, *Law and Power in the Islamic World* (I.B. Tauris 2003) 2-3. M Alam, '*Sharī'a* and Governance in the Indo-Islamic Context' in D Gilmartin and BB Lawrence (eds), *Beyond Turk and Hindu: Rethinking Religious Identities in Islamicate South Asia* (University Press of Florida 2000) 216-45.

¹⁷ MQ Zaman, *Religion and Politics Under the Early 'Abbāsids: The Emergence of the Proto-Sunnī Elite* (Brill 1997) 208-12.

¹⁸ M Hodgson, *The Venture of Islam* (1 of 3 vols, University of Chicago Press 1974) 238. RH Helmholtz, 'Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250-1640' (1990) 12 *Cardozo Law Review* 707. W Jones, 'The Two Laws in England: The Later Middle Ages' (1969) 11 *Journal of Church and State* 111. JH Baker, *An Introduction to English Legal History* (4th edn OUP 2007) 126-32.

were another set of claimants to moral authority.¹⁹ Historically, the actual picture regarding competing authorities in a Muslim state and society was much more complex. However, this simplified depiction of the history of *Sharī'a* helps us understand the complex historical processes which defined the relationship between rulers, '*ulamā*' and community.

The advent of the impersonal state disrupted this classical arrangement between '*ulamā*' and rulers.²⁰ The British employed the services of '*ulamā*' during the early days of their rule in India. The new colonial masters followed the policy of previous rulers in providing patronage to religious institutions. Even classical *Fiqh* texts were printed under the authority of the East India Company,²¹ and the Governor-General, Warren Hastings himself founded a *madrassa* (religious seminary/school) in Calcutta in 1781.²² At the top of British priorities was the requirement of the colonial state to exercise sovereign control with minimal local agency. In the eyes of the colonialists, law, whether European or indigenous, was in the first place a means to an

¹⁹ KA Nizami, 'Early Indo-Muslim Mystics and their Attitude towards the State' (1948-1949-1950) *Islamic Culture* (22) 387-98, (23) 13-21, 162-70, 312-21, (24) 60-71; A Ahmad, 'The Role of Ulema in Indo-Muslim History' (1970) *Studia Islamica* 1.

²⁰ The new political organisation is characterised as 'an impersonal government of law' built on 'a system upheld by its inherent principles, and not by the men who are to have the occasional conduct of it'. E Stokes, *The English Utilitarians and India* (Clarendon Press 1959) 7.

²¹ The Committee of Public Instruction published the texts of various *Fiqh* books such as the *Fatāwā al-Ālamgīriyya* and the *Kifāya*, a commentary of the *Hidāya* in 1828 and 1834 respectively in order to preserve them against mistakes and distortions committed by transcribers. During this period the *Hidāya* was also taught at state run schools. Report of the General Committee of Public Instruction of the Presidency of Fort William in Bengal (Baptist Mission Press 1837) 83-84.

²² He did this at the request of the Muslims of Calcutta by purchasing a site out of his own pocket and asked the Court of Directors to assign 'the rents of one or more villages' in the neighbourhood as an endowment for the institution. HV Lovett, Education and Missions to 1858 in H. H. Dodwell (eds) *The Cambridge History of India*, Vol 6 (The Indian Empire 1858-1918) (CUP 1932) 95-6.

end: to secure colonial domination.²³ Though it was impossible to completely ignore natives in the administration of the Indian state, the British did not want to rely solely upon them, especially in regard to the administration of justice. This conflict resulted in the fragmentation of various areas of law, but not the legal system. The same judicial system simultaneously applied various religious laws of natives along with the statutes promulgated by the state. The pre-colonial judicial system was plural, where various laws and procedures existed side by side. The East India Company started to limit this legal pluralism and united various indigenous legal systems under one judiciary, mainly presided over by British judges in higher courts, though native judges were employed in local courts. At appellate courts, local 'legal experts' advised judges who were ignorant of local laws. But the probity of these native experts was questioned and various religious texts were translated into English in order to enable British judges to independently decide cases. After these translations were made available and were adopted in court cases, the advisory posts of native legal experts were abolished. Judges became the sole arbiters of disputes amongst natives.²⁴

The assumption of legislative powers by the organs of the state was the most significant departure from the past when it comes to the history of Islamic law in India. The colonial state appropriated both political and moral authority. Its political authority was based on force of arms, while its moral authority was developed

²³ J Fisch, 'Law as a Means and an End: Some Remarks on the Function of European and non-European Law in the Process of European Expansion' in WJ Mommsen and JAD Moor (eds), *European Expansion and Law* (Berg 1992) 38.

²⁴ DHA Kolff, 'The Indian and British Law Machines: Some Remarks on Law and Society in British India' in WJ Mommsen and JAD Moor (eds), *European Expansion and Law* (Berg 1992) 210-13.

gradually by implanting the image of the state as an arbiter of justice.²⁵ This does not mean that *'ulamā'* became irrelevant, or that the state was powerful enough to regulate the religious and personal affairs of Muslims. The relationship between *'ulamā'* and community did not change significantly as *'ulamā'*, rather than courts, advised on the day-to-day issues regarding religious and personal affairs. In fact, the advent of the colonial state strengthened the relationship between *'ulamā'* and community.²⁶ However, the relationship between the state and *'ulamā'* changed significantly. The colonial state tried to directly rule its subjects. Thus the intermediary role of *'ulamā'* was completely abolished.²⁷ This also marginalised the role of *'ulamā'* as the custodians of *Sharī'a*. Their sphere of influence was restricted to primarily religious affairs and that too devoid of any state authority.²⁸ *'Ulamā'* were replaced by new cultural and legal intermediaries in the form of English educated native lawyers and barristers, who simultaneously collaborated with the new

²⁵ M Mukherji, *India in the Shadows of Empire: A Legal and Political History (1774-1950)* (OUP India 2009) xiv-xxxviii, especially chapter 3 'Into the Labyrinth', 73-104.

²⁶ F Robinson, 'Crisis of Authority: Crisis of Islam?' (2009) 19 *Journal of the Royal Asiatic Society* (Third Series) 339; F Robinson, 'Strategies of Authority in Muslim South Asia in the Nineteenth and Twentieth Centuries' (2013) 47 *Modern Asian Studies* 1.

²⁷ The Indian *'ulamā'* insisted on the appointment of Muslim *qāḍīs* in order to deal with issues regarding Islamic law. The *'ulamā'* of Deoband even tried to set up their own courts in an attempt to circumvent the Anglo-Indian courts. BD Metcalf (n 5) 138, 146-47. The government yielded to the demands of Muslims and passed the Kazis Act 1880 empowering State governments to appoint *qāḍīs* 'after consulting the principal Muhammadan residents'. These kazis (*qāḍīs*) did not have exclusive administrative or judicial powers. However, *'ulamā'* provided arbitration services on family matters in some parts of India and their award was filed with the civil courts for enforcement. ST Mahmood, *Muslim Personal Law: Role of the State in the Sub-continent* (Vikas Publishing House 1977) 60-69. In 1921, *'ulamā'* set up a system of religious courts in the districts of Bihar. These courts were subject to a provincial council which was headed by an *Ameer-i-Sharī'at*. F Robinson, *Separatism Among Indian Muslims: The Politics of the United Provinces' Muslims, 1860-1923* (first published 1974, OUP 1997) 329-30. E Moosa, 'Shariat Governance in Colonial and Post Colonial India' in BD Metcalf (ed) *Islam in South Asia in Practice* (Princeton University Press 2009) 317-25.

²⁸ Benton observes the ability of modern state law to curtail plural legal order through its ability to establish a monopoly on violence. L Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (CUP 2002) 8.

legal order and resisted its effects.²⁹ Thus the story of the development of Anglo-Muhammadan law is intricately interwoven with the story of the development of the modern state in British India.

1. Transformation of *Fiqh* into Muhammadan Law

The interaction between Islamic law and English law in British India was a unique incident in Indian legal history. When these two different types of legal systems interacted with each other the resulting mixture was fundamentally different from both.³⁰ The translation, codification and implementation of *Fiqh* created ‘a product quite different from the sum of its parts—a hybrid law, not a plural law’.³¹ Schacht described Anglo-Muhammadan law as ‘a unique and most successful and viable result of symbiosis of Islamic and English legal thought’.³² This is followed by Coulson who describes Anglo-Muhammadan law as ‘a remarkable fusion of the two systems... aptly termed Anglo-Muhammadan law, because, through the introduction of English legal principles and concepts, the law applied by the Indian courts came to diverge in many particulars from traditional *Sharī‘a* law.’³³ Other scholars describe this

²⁹ Ibid 17. A large number of politicians in British India were lawyers. Mukherji, chapter 4 ‘Vakil Raj’ (n 25) 106-48.

³⁰ IR Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority and the Making of the Muslim State* (PhD Thesis, Washington University 2008) 29-31.

³¹ Ibid 240.

³² J Schacht, *An Introduction to Islamic Law* (OUP 1964) 96. J Schacht, ‘Problems of Modern Islamic Legislation’ (1960) *Studia Islamica* 99, 112.

³³ NJ Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 164-65.

transformation as the ‘modernity of tradition’.³⁴ According to them, traditional *Sharī‘a* under colonialism was presented in non-traditional terms as Anglo-Muhammadan law.³⁵

Under colonialism, *Sharī‘a* was transformed into state law to suit the needs of the colonial state.³⁶ According to Wael B. Hallaq, Anglo-Muhammadan law was the law that the British created or caused to be created in India. Therefore, it was affected by the British perception of governance and the requirements of a modern state. He regards Anglo-Muhammadan law as an interim colonialist solution that mediated the British dominance of India.³⁷ Asaf Fyzee (1899-1981), a prominent Indian jurist, distinguished Anglo-Muhammadan law from *Sharī‘a* or *Fiqh*. He identified Muhammadan law as ‘that portion of the Muslim Civil Law which is applied in British India to Muslims as a personal law.’³⁸ He later adopted the term ‘Muslim Personal Law’ instead of ‘Muhammadan Law’. He explained that the term ‘Muhammadan Law’ was ‘neither accurate nor felicitous’. He objected to the use of ‘Muslim Law’ on the ground that ‘Muslim’ could not be applied to any thing or concept because only a rational human being is capable of making a decision about faith. Thus the term ‘Muslim’ cannot be applied to non-human objects or a field of

³⁴ This phrase used for Hindu law also applies to Islamic law. LI Rudolph and SH Rudolph, *The Modernity of Tradition: Political Development in India* (University of Chicago Press 1967) 279-93.

³⁵ This comment made in the context of Southeast Asia equally applied to India. KV Benda-Beckmann, *Traditional Values in a Non-traditional Context: Adat and State Courts in West Sumatra* (University of Andalas Padang 1980); KV Benda-Beckmann, 'Traditional Values in a Non-traditional Context: Adat and State Courts in West Sumatra' (1982) 10 *Indonesia Circle, School of Oriental & African Studies Newsletter* 39.

³⁶ Hussin (n 30) 29-31.

³⁷ WB Hallaq, *Sharī‘a: Theory, Practice, Transformations* (CUP 2009) 377-83.

³⁸ AAA Fyzee, *Outlines of Muhammadan Law* (1st edn OUP 1949) 2.

study.³⁹ M.B. Hooker takes a different approach to this terminology. He distinguishes Muhammadan law and Islamic law from a cultural perspective. He defines Muhammadan law as the law applying to the individual Muslim, hence called Muhammadan or Muslim law. In contrast, Islamic law is derived from the *Qur'ān* and *Sunna* and is defined in terms of Arabic culture. He accepts that both terms are not mutually exclusive since 'to a significant extent the Islamic element is included in all cultural manifestations of the Muhammadan laws, but the latter are also *sui generis* to an important degree.'⁴⁰ The social and cultural aspect of Muhammadan law is also accepted by Fyzee. In his later work, he defined Muhammadan law as 'that portion of the law of Islam, which is received in India, and which is affected both by the changing social conditions prevailing in the country and by the principles of English law and equity, so far as they conduce to justice'.⁴¹

Fyzee, however, does not appreciate the political context of Muhammadan law, which in the post-colonial period was termed as 'Islamic law'. In fact, he disregards the use of the term 'Islamic law' as a purist approach which need not be taken seriously.⁴² The missing political aspect of Anglo-Muhammadan law is explored by Iza Hussin in her comparative study of legal developments in colonial India, Malaysia and Egypt. Following Fyzee and Hooker, she argues that Islamic law is neither equivalent to *Shari'a* nor to *Fiqh*. Rather, she emphasises that Islamic law as we know

³⁹ AAA Fyzee, *The Reform of Muslim Personal Law in India* (Nachiketa Publications 1971) 11.

⁴⁰ MB Hooker, *Islam in South-East Asia* (Brill 1983) 160-61.

⁴¹ AAA Fyzee, 'Muhammadan Law in India' (1963) 5 *Comparative Studies in Society and History* 401, 413.

⁴² *Ibid.*

it today is a ‘modern construction’ born during colonialism and deeply rooted in its relationship with the state. Its political development is deeply implicated in the political relationship among diverse local elites and colonial officials.⁴³ The colonial elites included officials, administrators, judges, politicians and prominent merchants. The local elites comprised local chiefs, rulers, religious leaders (*‘ulamā’*), landlords and traders. She notes that the local elites and colonial officials had unequal resources, diverse interests and capacities. They employed different strategies to achieve their varied motives. Her findings endorse the argument of other scholars regarding displacement of old intermediaries. She finds that a small Westernised intellectual elite in colonial territories played the role of cultural intermediaries, who interacted and negotiated with the colonial elites often from a very unequal base.⁴⁴

The transformation of *Shari‘a* or *Fiqh* during colonialism is also evident in the legal terminologies employed by various authors. The translations of classical *Fiqh* texts were termed as ‘Muhammadan codes of law’. When these codes were applied in courts and were supplemented with precedents of higher courts, the legal commentaries, which organised these decisions in systematic forms, were named ‘Anglo-Muhammadan law’.⁴⁵ However, when Muslim commentators wrote their treatises combining not only case law but also selected parts of translations from a large variety of Islamic legal texts, they preferred to use the term ‘Muhammadan law’. The treatises of Ameer Ali, Abdur Rahim and Faiz Tyabji show this trend, which was

⁴³ Hussin (n 30) 5, 232.

⁴⁴ Ibid 7-8, 249. Similar findings are presented in SE Merry, ‘Law and Colonialism’ (1991) 25 *Law & Society Review* 889.

⁴⁵ RK Wilson, *A Digest of Anglo-Muhammadan Law* (1st edn W. Thacker & Co 1895).

followed by Dinshah Mulla and Vesey-Fitzgerald. The earliest use of the term ‘Muhammadan Law’ in the title of a book was made by a Hindu author Shama Churun Sircar for his *Tagore Law Lecture of 1873*.⁴⁶ Earlier, Macnaghten had called his treatise the *Principles and Precedents of Moohumudan Law*.⁴⁷

By the end of colonialism the inadequacy of the term ‘Muhammadan’ was realised and it was translated as ‘Muslim’. At the same time, transformation in the nature of *Fiqh* under colonial experience was also recognised. During colonialism, *Fiqh* was confined to family law and personal affairs. Therefore, the treatises of Muhammadan law were entitled as ‘Muslim Personal Law’ in the post-colonial period. Other treatises, which did not confine themselves to family law, used a relatively modern term ‘Islamic law’. Therefore, the titles of the books were changed from Muhammadan Law to Islamic Law in the second half of the twentieth century. These books included not only the later editions of the translation of the *Hidāya* by Hamilton and Abdur Rahim’s *Principles of Muhammadan Jurisprudence*, but also Schacht’s celebrated works. He used the term ‘Muhammadan Jurisprudence’ in 1950 but later preferred the term ‘Islamic law’ for his work published in 1964.⁴⁸

⁴⁶ SC Sircar, *Tagore Law Lectures—1873 The Muhammadan Law* (Thacker, Spink and Co. 1873).

⁴⁷ WH Macnaghten, *Principles and Precedents of Moohummudan Law* (3rd edn first published in 1825, J. Higginbotham 1864).

⁴⁸ J Schacht, *The Origins of Muhammadan Jurisprudence* (Clarendon Press 1950); Schacht, *An Introduction to Islamic Law* (n 32). Schacht does not appear to be cognizant of this terminological transformation. He had used the term ‘Islamic law’ rather ‘Muhammadan law’ in his article published in 1950. J Schacht, ‘Foreign Elements in Ancient Islamic Law’ (1950) 32 *Journal of Comparative Legislation and International Law* 9. But he used the term ‘Muhammadan Theology’ in his later article published in 1953. J Schacht, ‘New Sources for the History of Muhammadan Theology’ (1953) *Studia Islamica* 23.

2. Modes of Transformation and Native Participation

The first mode by which *Sharī‘a* was transformed was the translation of classical legal texts. These translations were characterised as ‘codes of law’. During the second half of the eighteenth century, the East India Company assumed control of civil courts in Bengal, Bihar and Orissa. In 1786, the Nawab Governor-General, Warren Hastings ordered the translation of the *Hidāya* of Marghīnānī, a twelfth century textbook.⁴⁹ The *Hidāya* was one of the most popular books of *Ḥanaḥī Fiqh*, which was taught at *madāris* (schools). The need for a translation arose in order to empower British judges to decide disputes between natives without the help of local experts who were seen to be either prone to corruption or incapable of performing their duties as magistrates of the British Empire.⁵⁰ However, translations of selected legal texts did not result in the replacement of local legal experts forthwith, and it was only in 1864 that the office of native advisors to the higher courts was abolished.

Before the translation of the *Hidāya* could be made available, Francis Gladwin translated a small booklet, the *Mirāt ul Missāyil*, from Persian into English in 1786. But this short eighty-two page booklet could not be used either by administrative or judicial officers because of its lack of details.⁵¹ Five years later, Charles Hamilton

⁴⁹ Y Meron, 'Marghīnānī, His Method and His Legacy' (2002) 9 *Islamic Law and Society* 410.

⁵⁰ William Jones suggested that knowledge of native laws was essential for English judges in order to keep a check on local legal experts who he said were lacking in both their integrity and capability. W Jones, *The Works of Sir William Jones edited by Lord Teignmouth* (vol 8, J. Stockdale and J. Walker 1807) 162-63. Similar views were expressed by Hamilton in the ‘Preliminary Discourse’ of his translation. C Hamilton, *The Hedaya, or Guide; A Commentary on the Mussulman Laws* (1 of 4 vols, T. Bensley 1791) vii.

⁵¹ In its preface, the translator stated that the book was written in Persian for the use of the Emperor Muhammad Shah. He asserted that his translation conveys the general idea of Muhammadan law about which little was known by the British. He stated that his work might be useful for the public in the period until the translation of the *Hidāya* produced by Mr James Anderson and Captain Hamilton was

published a translation of the *Hidāya*. Like Gladwin's translation, Hamilton did not translate the *Hidāya* directly from its Arabic text. As Hamilton did not know Arabic, a Persian translation of the *Hidāya* was prepared for him. He then translated it into English. Hamilton did not act as a mere translator, he also edited the *Hidāya* by purging the text of unnecessary details and omitted the translation of the chapters he regarded as purely religious obligations dealing with ablution, prayer, fasting and pilgrimage.⁵² It was not until 1870 that a second edition of Hamilton's translation of the *Hidāya* was published with a preface by Standish Grove Grady. Grady excluded some chapters in order to reduce the three volumes into one.⁵³ The *Hidāya* covered various areas of law but not inheritance. Therefore, William Jones translated a popular text on inheritance known as the *Sirājiyya* of Sirāj al-Dīn Sajāwandī (fl. c. 600/1203) in 1792.⁵⁴ It is not without interest that in the following year, the Bengal Regulations replaced custom with Islamic inheritance law.⁵⁵ Thus the colonial project of translations was intimately connected with the project of governance and control.⁵⁶ The *Hidāya* along with the *Sirājiyya* remained key texts for judicial and revenue officers for the determination of so called Muhammadan law. It was more than half a

published. F Gladwin, *An Epitome of Mohammedan Law* (Translated from the original Persian, William Mackay 1786). It contained only three short paragraphs on waqf. 43-44.

⁵² Hamilton (n 50).

⁵³ SG Grady, Charles Hamilton' *The Hedaya, Or Guide: A Commentary on the Mussulman Laws* (2nd edn WH Allen 1870).

⁵⁴ Sirāj al-Dīn Muḥammad ibn Muḥammad Sajāwandī, *Al Sirājiyya; or, the Mahomedan Law of Inheritance* (Reprinted from the translation of Sir William Jones, published at Calcutta in 1792. With notes and appendix by Almaric Rumsey, W. Amer 1869).

⁵⁵ It is argued that the Regulations 1793 intended to divide the estates of landlords. R Pal, *The History of the Law of Primogeniture with Special Reference to India, Ancient and Modern* (University of Calcutta 1929) 347-65.

⁵⁶ JG Thiessen, *Orientalism and the East India Company, 1773-1858* (PhD Thesis, The John Hopkins University 1992) 361-62.

century later, that Neil B.E. Baillie translated certain parts of the *Fatāwā al-‘Ālamgīriyya* into English in the form of *The Moohummudan Law of Sale* (1850), *The Land Tax of India* (1853) and *A Digest of Moohummedan law* (1875). The *Fatāwā al-‘Ālamgīriyya* was a compendium of authoritative rulings of Ḥanafī *Fiqh* based on various texts. It was compiled at the order of the Mughal Emperor Aurangzeb ‘Ālamgīr in the last quarter of the seventeenth century.⁵⁷ Baillie also partially translated the *Sharā‘a al-Islām*, a popular *Ja‘farī Shī‘ī* school text of Al-Muḥaqqiq al-Ḥillī (d. 676/1277) as the *Digest of Moohummudan law* (1869). These works were used as the ‘civil code’ of Muhammadan law. These ‘codes’ helped the colonial state to rid local agency from the administration of justice.⁵⁸

These texts did not cover all aspects of life. Conspicuously missing were regulations for the administration of public life. It is intriguing that the colonial administrators did not seriously consider *ā‘yn* (imperial law), though the famous book of Emperor Akbar’s minister Abū al-Faḍl on governance of state, the *Ā‘yn-i Akbarī* (Constitution of Emperor Akbar), was translated and published in 1873.⁵⁹ Strawson argues that the Orientalist scholars deleted Islamic public law from their legal texts in

⁵⁷ J Schacht, 'On the Title of the *Fatāwā al-‘Ālamgīriyya*' in C Bosworth (ed) *Iran and Islam* (Edinburgh University Press 1971); H Liebesny, 'English Common Law and Islamic Law in the Middle East and South Asia: Religious Influences and Secularization' (1985) 34 *Cleveland State Law Review* 19, 21. Its name has misled many fine scholars to assume that it was a compilation of juristic opinions. See A Rahim, *The Principles of Muhammadan Jurisprudence* (Luzac & Co. 1911) 190. Wilson and David Pearl repeat this in their treatises. RK Wilson, *Anglo-Muhammadan Law* (5th edn, W. Thacker & Co., 1921) 43; D Pearl, *A Textbook on Muslim Personal Law* (1st edn Croom Helm 1979) 22.

⁵⁸ Hamilton had pointed out that the practical utility of these ‘codes’ was not simply limited to governance and the administration of justice, it also served the commercial interests of the British Empire by serving as ‘a source of desirable knowledge to the merchant and traveller’ all over the Muslim world. Hamilton (n 50) lxxxvii.

⁵⁹ Abū al-Faḍl, *Ā‘yn-i Akbarī* (H. Blochmann tr, 3 vols, Asiatic Society of Bengal 1873). The colonial project of exploration of the history of India started a century earlier in the form of A Dow, *The History of Hindostan* (3 vols, T Becket and P.A. De Hondt 1772).

order to meet the requirements of the colonial state.⁶⁰ This criticism is partially correct because the *Fiqh* texts did not include any chapters on constitutional law, though a chapter on international law (*siyyir*) could be found in the *Hidāya*.⁶¹ The famous English legal historian, Frederick Pollock in a treatise that he wrote on private law in India, contrasted the law in India which was personal as against European law which was territorial. He noted that the law in medieval Europe had been personal, and that a transformation had taken place only in the nineteenth century.⁶² This analysis of pre-colonial legal history downplayed the role of imperial law in Mughal India, though he later observed in the same treatise that Muhammadan criminal law was not personal in nature and was applied to communities of all faiths. This theoretical depiction of India without any public law served an important function. The ‘legal emptiness’ was to be filled through imperial law by the British in areas of criminal law, and generally civil law and procedural law. Therefore, the ‘Common Law of British India’ was created through direct legislation in the form of statutes collected as the Anglo-Indian Codes, and by the judicial introduction of English law by courts.⁶³

A hierarchal judicial system was introduced in India in 1862. Lower courts were established at the district level and appeals could be made to the higher courts.

⁶⁰ J Strawson, 'Islamic Law and English Texts' (1995) 6 *Law and Critique* 21, 25.

⁶¹ Hamilton (n 50) (2 of 4 vols) Book IX ‘Al Seyir, or the Institutes’, 139-256.

⁶² F Pollock, *The Law of Fraud, Misrepresentation and Mistake in British India* (Thacker, Spink 1894) 1-3.

⁶³ *Ibid* 4-5. In contrast, the first Muslim judge Justice Mahmood, promoted Muslim law that had been administered by previous Muslim rulers in India as the existing law of the land to which recourse should first be made when existing legislation proved inadequate to answer legal questions. AM Guenther, *Syed Mahmood and the Transformation of Muslim Law in British India* (PhD Thesis, McGill University 2004) 303.

The Judicial Committee of the Privy Council was made the highest court of appeal. The Privy Council in its decision in 1876 clarified that English law had never been imported into India as a whole and if it should be so imported it must be by virtue of some express legislation or specific principle appropriate to the matter in hand.⁶⁴ But this did not restrict the importation of English law under the formula of justice, equity and good conscience. It was specifically acknowledged by the Privy Council a decade later that equity, justice and good conscience should generally be interpreted to mean ‘the rules of English law, if found applicable to Indian society and circumstances.’⁶⁵

The court decisions provided material for another mode of transformation. The Anglo-Indian courts were not simply adjudicating legal disputes, they were also building legal principles on the basis of their decisions.⁶⁶ Legal textbooks were written which systematized court decisions for use by practitioners and judges. The first of these books was published in 1825 by William Hay Macnaghten as *Principles and Precedents of Moohummudan Law*.⁶⁷ The tradition set by Macnaghten was followed by Sircar, Ameer Ali, Muhammad Yusuf, Abdur Rahman, Wilson, Tyabji, Mulla, Abdur Rahim, Fyzee and Vesey-Fitzgerald. These commentators were not simply academics. Ameer Ali, Mulla, Abdur Rahim and Tyabji were practitioners who later became judges of High Courts. Ameer Ali and Mulla later became judges of

⁶⁴ *Mayor of Lyons v East India Co* (Bengal) [1876] UKPC 23, 1 MIA 175. It was also held that the Statute of Mortmain did not extend to the territories in the East Indies.

⁶⁵ *Waghela Rajsanji v Shekh Masludin* (Bombay) [1887] UKPC 9.

⁶⁶ BS Cohn, 'Anthropological Notes on Disputes and Law in India' (1965) 67 *American Anthropologist* 82, 105.

⁶⁷ Macnaghten was born in Calcutta and was fluent not only in Persian and Sanskrit but also in Arabic. He had served as a magistrate and registrar of the *Sadr Diwani Adalat*. Katherine Prior, 'Macnaghten, Sir William Hay, baronet (1793–1841)', *Oxford Dictionary of National Biography*, OUP, 2004, <http://www.oxforddnb.com/view/article/17705>, accessed 18 April 2012.

the Privy Council. These textbooks were not simply a systematic organization of judicial decisions, they also commented upon judicial authorities. Ameer Ali's treatises provided a critique of judicial decisions especially in the light of classical *Fiqh* texts. Abdur Rahim's *Principles of Muhammadan Jurisprudence* was the first English translated book on the science of *Fiqh (usūl al-Fiqh)*.⁶⁸ It was based on classical texts and remained the only textbook on this subject in British India. These textbooks went into several editions covering the latest judicial decisions. Wilson and Vesey-Fitzgerald taught law at Cambridge University, and the School of Oriental and African Studies, University of London respectively. They also gave tutorials to officers of the Indian Civil Service. Ameer Ali wrote a students' edition of his book and Abdur Rahim's treatise was a recommended text for the LL.B course on Muhammadan law. Later Mulla's book was taught at university level.⁶⁹ Mulla, Tyabji and Fyzee also taught at Bombay Law College. Their treatises were intended for law students as the main audience.

The whole project of translation, adjudication, judicial codification in the form of legal commentaries/textbooks and legal education was led by the colonial state. Hamilton translated the *Hidāya* upon the direct instructions of Warren Hastings, the Governor-General of the East India Company. Baillie's translations were also

⁶⁸ He mentions seventy-one original authorities as his primary material for this treatise. Rahim (n 57) xi-xiii.

⁶⁹ A complete syllabus for the first year of LL.B degree at Allahabad University is provided in GC Kozłowski, *Muslim Endowments and Society in British India* (PhD Thesis, University of Minnesota 1980) 209.

sponsored by the state. The law journals were published under state patronage.⁷⁰ Sircar, Ameer Ali and Abdur Rahim produced their treatises under the Tagore Fellowship of Calcutta University. A treatise on a specific legal topic was produced under this fellowship each year. Leading English historians such as Pollock and Holdsworth wrote treatises under this fellowship.⁷¹ It appears that a market for law books had developed both in India and England as these textbooks were published from London and Calcutta.

While taking note of the function of these textbooks to organise knowledge, Anderson observes that they transformed *Sharī'a* into 'a fixed body of immutable rules'.⁷² This view is supported by Wael Hallaq who argues that traditionally the *Hidāya* 'did not constitute the law, but the interpretative basis on which the law might be founded in a particular time and place.'⁷³ He observes that the doctrine of *stare decisis* transformed the sources of legal authority in *Sharī'a* from 'dialectics of textual sources and context-specific social and moral exigencies' to 'judge made law'. This resulted in what he calls the 'rigidification of Islamic law'.⁷⁴ He notes the dual function furnished by the translation of the *Hidāya*: codification of the law and

⁷⁰ Early law reporting was a private initiative and up to 1850 various judges published numerous law reports. With the passing of the Indian Law Reports Act 1875, the era of authentic law reporting started in India. MP Jain, *Outline of Indian Legal History* (2nd edn N. M. Tripathi 1966) 739-43.

⁷¹ Pollock (n 62); WS Holdsworth, *Some Makers of English Law: The Tagore Lectures, 1937-38* (OUP 1938).

⁷² MR Anderson, 'Islamic Law and the Colonial Encounter in British India' in D Arnold and P Robb (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press Ltd 1993) 14. For a slightly revised and extended version of this article see MR Anderson, 'Legal Scholarship and the Politics of Islam in British India' in RS Khare (ed) *Perspectives on Islamic Law, Justice, and Society* (Rowman & Littlefield 1999) 65-91.

⁷³ Hallaq, *Sharī'a* (n 37) 375-76.

⁷⁴ *Ibid* 381-82.

totalistic legal control independent of local agency. This, according to him, expunged flexible customary practices and fixed the law by cutting it from its 'interpretative-juristic' tradition and the 'native social matrix' in which it was 'embedded and on which its successful operation depended.'⁷⁵ This happened because the barristers and advocates trained by an English legal education, whom he calls 'Macaulay's children', replaced the *Sharī'a* trained '*ulamā*'.⁷⁶ These views are supported by an American legal sociologist Marc Galanter who observed the impact of codification and precedent on Hindu law, and stated that one of the most remarkable and unanticipated results of the British administration of Hindu law was 'the elevation of the textual law over lesser bodies of customary law'.⁷⁷ The reason for this is attributed to common law's hostility to local unwritten customs, which were difficult to prove. He observed that an over-reliance on primary texts, which in actuality were 'subject to variable interpretation and quasi-legislative innovation at the discretion of village notables or elders' turned the *sastric* law into a body of fixed law.⁷⁸ These comments could also be applied to Muhammadan law. What is even more interesting is the fact that court decisions were also used to codify local customs in India, especially in the Punjab.⁷⁹ The colonial state used the codification of local legal tradition as an important tool of governance.

⁷⁵ Ibid 376.

⁷⁶ Ibid 379.

⁷⁷ M Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24 Journal of Social Issues 65, 74.

⁷⁸ Ibid 73.

⁷⁹ CL Tupper, *Punjab Customary Law* (3 vols, Superintendent of Govt Printing 1881); HAB Rattigan, *A Digest of Civil Law for the Punjab Chiefly based on the Customary Law* (7th edn, Wildy and Sons 1909); HA Rose and MM Shafi, *A Compendium of the Punjab Customary Law* (Civil and Military Gazette Press 1911); S Roy, *Custom and Customary Law in British India* (Hare Press 1911).

This study finds that the effect of the judicial principle of precedent is overstated in the arguments of above scholars. It is true that the decisions of higher courts were binding on lower courts. But, as is shown later regarding waqf cases, the higher courts did not strictly apply this principle. The rigour of this principle was also mitigated by the presence of several High Courts in India. Each High Court was independent and was not bound by the decisions of the others. Rather, different Indian High Courts delivered conflicting decisions on legal points on particular issues. Various legal issues were subjected to judicial analysis by judges, lawyers and legal commentators before they could become a binding principle. The Privy Council took these legal debates into account before laying down a judicial principle. Even when a certain legal principle was conclusively laid down, there were still two options available to amend it. First, through legislation as happened in the case of family awqāf after they were declared invalid by the Privy Council, and second, by judicial revision of that principle in a subsequent case, though this was rare. It is also worth noting that unlike the House of Lords in the late nineteenth and mid twentieth century, the Privy Council was not bound by its previous decisions.⁸⁰ But in a case on family waqf, the Privy Council refused to deviate from its earlier decision.⁸¹ Further, judges could restrict or expand a judicial principle by distinguishing it based on the facts of a particular case. Finally, courts could develop new legal principles by taking into account various socio-economic factors. Thus after laying down the principle that a valid waqf could only be created if there was a ‘substantial dedication to charity’ in

⁸⁰ *Read v Bishop of Lincoln* (The Arches Court of Canterbury) [1892] UKPC 46, AC 644; *Mercantile Bank of India v Central Bank of India* (Madras) [1937] UKPC 105, [1938] AC 287; *Gideon Nkambule v R* (Swaziland) [1950] UKPC 1, AC 379.

⁸¹ *Fatuma Binti Mohammed Bin Salim Bakhshuwem v Mohammed Bin Salim Bakhshuwem* (Eastern Africa) [1951] UKPC 27. See chapter 2 for details.

1894, the Privy Council introduced a new test of ‘dominating purpose and intention of the grantors’ in 1916.⁸²

It is also worth noting that the colonial state was neither monolithic nor omniscient. Therefore, it required the help of natives for its inception, development and operation. Guenther shows that despite their being in a weaker position vis-à-vis colonial administrators, Indian Muslims actively participated in the transformation of Islamic law as translators, administrators, lawyers, judges and legal commentators.⁸³ His views are supported by other researchers such as John Comaroff, Jon Wilson and Robert Travers. They argue that despite its emphasis on brute force, the colonial regime was shaped partially by the colonised through a constant process of negotiation and information sharing.⁸⁴ After reviewing existing literature on the history of non-European lawyers in the British Empire, Mitra Sharafi describes them as ‘intellectual middlemen’ who were neither ‘villainous collaborators’ nor ‘heroes exercising agency’.⁸⁵ More recently, Frass and Fareeha confirmed these findings by arguing that the locals played an important role in the making of the colonial state and its functioning under the legal system.⁸⁶ It is also important to note that a majority of

⁸² *Mutu K. A. Ramannadan Chettiar v Vava Levvai Marakayar* (Madras) [1916] UKPC 107, 44 IA 21. See chapter 2 for details.

⁸³ Guenther (n 63) 23.

⁸⁴ JL Comaroff, *Ethnicity, Nationalism, and the Politics of Identity in an Age of Revolution* (American Bar Foundation 1994) 5; JE Wilson, *The Domination of Strangers: Modern Governance in Eastern India, 1780-1835* (Palgrave Macmillan 2011) 1-18; R Travers, *Ideology and Empire in Eighteenth-Century India: the British in Bengal* (CUP 2007).

⁸⁵ M Sharafi, 'A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire' (2007) 32 *Law & Social Inquiry* 1059, 1084.

⁸⁶ AM Frass, "They Have Travailed into a Wrong Latitude:" *The Laws of England, Indian Settlements, and the British Imperial Constitution 1726-1773* (PhD Thesis, Duke University 2011); F Khan, *Traditionalist Approaches to Sharī‘ah Reform: Mawlana Ashraf ‘Ali Thānawi’s Fatawa on Women’s Right to Divorce* (PhD Thesis, Michigan University 2008).

legal commentators were Indians with the exception of Roland Wilson and Vesey-Fitzgerald. The fifth edition of Wilson's treatise was revised and updated by an Indian Muslim— A. Yusuf Ali.⁸⁷

This thesis demonstrates how the collaboration and resistance by the locals took place in practice. In Chapter 2, it is shown that the judicial decision of invalidating the family waqf was fiercely resisted by all classes of Muslims. Initial resistance came from within the legal system, in the form of legal commentary by Ameer Ali, and was followed by the treatises of other Muslim commentators. It was further supported by the judgments of other Muslim judges such as Syed Mahmood. When the resistance from within the judicial system failed, the issue was contested in the public sphere through representations to the Viceroy and even to the House of Lords and the House of Commons. Articles were contributed on this issue in legal journals and treatises were written to prove the validity of family awqāf. Journalists and politicians also contributed in the wider public discourse. Even '*ulamā*', who generally distanced themselves from the British judicial system, participated in debates and issued *fatāwā* in favour of family awqāf.

3. Was Anglo-Muhammadan Law a necessary product of the nation state?

A majority of the scholars, who criticise colonialism for negatively affecting the local legal traditions, regard the colonial intervention as an inevitable consequence of the

⁸⁷ Yusuf Ali states that in preparation of the updated edition, he received advice and assistance from Wilson who died in October 1919. Wilson, *Anglo-Muhammadan Law* (n 57) v-vii.

introduction of a modern nation state in India.⁸⁸ Displacement of community based, flexible law was perhaps the price for the impersonal state. Furnival blames the enforcement of uniform law that tended to break up the community-based village into individuals, which encouraged litigation and multiplied lawyers and moneylenders.⁸⁹ Derrett acknowledges that the Anglicisation of Indian law fixated the indigenous laws because of the segmented application of Hindu and Muslim laws without full regard to their larger context. However, he argues that without such modifications, 'Hindu law could not have been applied effectively or without unjust results.'⁹⁰ Bhattacharyya-Panda observes this transformation in her study of Hindu law relating to property and inheritance in colonial Bengal. She notes, 'the colonial codes of Hindu law were not simply an organized, written, and perhaps reformed version of an existing set of laws. Instead, they transformed the prescriptive, normative, and moralistic rules embodied in the *Dharmasāstras* into legal rules to be directly administered in court.'⁹¹ Scott Kugle takes exception to Anglo-Muhammadan law by regarding it as 'an interpretative experience that regulates and justifies the raw exercise of power'.⁹² He points out that the establishment of a modern state in South Asia opened Islamic law to 'new and disruptive influences'. He observes that the

⁸⁸ The subjects covered under personal law were exactly the same as that which fell within the jurisdiction of ecclesiastical courts in England until the second half of the nineteenth century. F Pollock and FW Maitland, *The History of English Law before the Time of Edward I* (1 of 2 vols, 2nd edn CUP 1898) 127-31.

⁸⁹ JS Furnivall, *Progress and Welfare in Southeast Asia: A Comparison of Colonial Policy and Practice* (Institute of Pacific Relations 1941) 22.

⁹⁰ JDM Derrett, 'The Administration of Hindu Law by the British' (1961) 4 *Comparative Studies in Society and History* 10, 44.

⁹¹ N Bhattacharyya-Panda, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal* (OUP 2008) 10.

⁹² SA Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35 *Modern Asian Studies* 257.

operation of colonial courts transformed customary law into statutory law and thus replaced local law by a national law. Further, he notes that ‘Islamic jurisprudence lost its dynamic substance while being reinforced and reified in form’. He concludes:

The British colonial administrators achieved these great changes believing that they were setting South Asian society on the proper path: the path of impersonal government, equal rights before the law, public welfare, and profitable business. But perhaps South Asians did not need a modern state, either in its essential operations or in the way it was imposed...⁹³

Scott Kugle does not elaborate on why South Asians did not need a modern state and thus leaves the question unanswered. Ebrahim Moosa, who also criticises colonialism for its disruptive influence on *Fiqh*, finds an ‘elective affinity’ by contemporary Muslims to ‘the practice, ordered symmetry, procedures and positivist features of colonial laws’ because these features were not very different from the Muslim juridical traditions.⁹⁴ Reza Pirbhai has traced the nexus of colonial legal transformation of *Shari‘a* in the late Mughal era when the *Fatāwā al-‘Ālamgīriyya* was compiled as a redactional code under the tutelage of the Emperor.⁹⁵ In fact, in the contemporary Ottoman Empire similar developments were taking place even in the

⁹³ Ibid 312-13.

⁹⁴ E Moosa, ‘Colonialism and Islamic Law’ in MK Masud, A Salvatore and Mv Bruinessen (eds), *Islam and Modernity* (Edinburgh University Press 2009) 176.

⁹⁵ The father of one of the most influential Muslim religious scholars of eighteenth century India, Shāh Walī Allāh (1703-1762) contributed to the compilation of the *Fatāwā al-‘Ālamgīriyya*. His two sons carried the family tradition of learning forward. One of his grandsons served as a *muftī* in the judiciary of the East India Company. MR Pirbhai, ‘British Indian Reform and Pre-colonial Trends in Islamic Jurisprudence’ (2008) 42 *Journal of Asian History* 36. In Muslim India, the tradition of compiling juristic compendium under the state patronage goes back to the thirteenth century. The *Fatāwā Ghiyāthiyya* was compiled by Dā‘ūd ibn Yūsuf al-Khatīb al-Baghdādī at the behest of Sultān Ghiyāthuddīn Balban (reigned 1266-1286 AD). Muslims jurists of India were also pioneers in the Muslim world for compiling legal works with the collective effort of scholars under state patronage. The *Fatāwā Tātārkhāniyya* compiled by ‘Ālim ibn ‘Alā al-Ḥanafī (d. 1397) is said to be a collective effort of a board of scholars headed by the named compiler. This is a monumental work comprising thirty volumes. Z Islam, *Fatāwā Literature of the Sultanate Period* (Kanishka Publishers 2005) 20-28.

absence of direct colonialism. Not only that *Fiqh* was codified in the form of the *Majalla* in 1870, but various legal codes were also borrowed from French law and Swiss law.⁹⁶ Even earlier, following the footprints of the Roman Empire which used law to expand its power,⁹⁷ the Ottoman Empire had used redacted *Fiqh* based on the Ḥanafī school in order to promote proto-citizenship in Egypt in the sixteenth century.⁹⁸

The nineteenth century was the period of great legal reforms all over the Muslim world because of two global factors: Westernisation of state and society, and the emergence of modernising states with centralised bureaucracies.⁹⁹ The nineteenth century was also a period of great legal reforms in England and Europe generally. At the dawn of this century, the *Code Napoléon* set a movement of codification for effective and efficient governance. In England, Bentham led a reform movement based on his utilitarian theory, which did not achieve much success at home. Yet, procedural reforms were made to the English legal system. This was followed by substantive legal reforms aimed at protecting industrial workers' rights, improving public health and removing disabilities of married women.¹⁰⁰

⁹⁶ JND Anderson, 'Codification in the Muslim World' (1966) 30 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 241.

⁹⁷ JQ Whitman, 'Western Legal Imperialism: Thinking about the Deep Historical Roots' (2009) 10 *Theoretical Inquiries in Law* 305.

⁹⁸ RA Meshal, *The State, the Community and the Individual: Local Custom and the Construction of Orthodoxy in the *Sijills* of Ottoman-Cairo, 1558-1646* (PhD Thesis, McGill University 2006).

⁹⁹ R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (CUP 2005) 103.

¹⁰⁰ Baker (n 18) 216.

This study finds that the changes brought into waqf law in British India were an inevitable consequence of the introduction of a modern state. Classical Islamic waqf law could not fit into the institutional structure of the modern state. Welfare institutions of the state such as schools, hospitals and municipalities started to provide public services previously provided under waqf.¹⁰¹ Similarly, the introduction of trusts, associations, societies and corporations could serve as a better mechanism for social and capital organisation. However, waqf maintained its importance as a religious symbol because of its entrenched history. But waqf law was made to fit into the political and judicial structure of the British Empire. A waqf could either be public or private.¹⁰² In each case, it was governed by different rules. Perpetuities for private awqāf were no longer tolerated even after the passing of the Mussalman Wakf Validating Act 1913 and its retrospective application under the 1930 Act, as the judiciary strictly construed the provisions of this Act. This judicial attitude coupled with the removal of tax exemptions hitherto enjoyed by family awqāf diminished their importance and made them less attractive as a means of investment for social and familial purposes.

¹⁰¹ T Kuran, 'The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System' (2001) 35 *Law & Society Review* 841. For an updated version see T Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton University Press 2011) 11-12, 110-15.

¹⁰² Interestingly, the public/private distinction under English law itself was the product of the nineteenth century. This distinction arose as a result of the emergence of a market economy, though its origins could be traced in the sixteenth and seventeenth centuries with the emergence of the nation-state. MJ Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423, 1424. J Weintraub, 'The Theory and Politics of the Public/Private Distinction' in J Weintraub and K Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press 1997) 1-42.

4. Judicial Codification, *Ijtihād* and Convergence

Most scholars have depicted *Sharī‘a* in the pre-colonial period as ‘communitarian’. It is true that during this period *Sharī‘a* was not a command of a sovereign backed by the sanction of the state for non-compliance. However, at the same time, *Sharī‘a* was not totally independent of state authority. Not only were criminal sanctions in specific *ḥudūd* offences enforced by the state,¹⁰³ but even in certain personal matters the sanction of a *qāḍī* was also required. Under classical *Fiqh*, the waqf system was heavily dependent on the state for its operation. In fact, the overall supervision of awqāf was vested in the *qāḍī*, who was a state appointed functionary.¹⁰⁴ Therefore, the difference between the pre-colonial state and the colonial state was more in terms of the degree of the power of the state rather than its fundamental character.¹⁰⁵

What distinguished the British legal system from the previous system was the role of the judiciary in the interpretation and development of law. One of the qualifications for a *qāḍī* according to the *Fatāwā al-‘Ālamgīriyya* was his capacity to perform independent reasoning (*ijtihād*) regarding issues where no valid authority could be found or jurists held divergent views. The *qāḍī* could also rely on the opinion of a *muftī* where he was not capable of exercising independent reasoning.¹⁰⁶ In this

¹⁰³ J Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769-1817* (Coronet Books 1983); R Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (OUP 2000).

¹⁰⁴ The *qāḍī* was authorized to interfere in the management of a waqf where there was a danger to waqf property either from a negligent trustee or the founder himself. Al-Shaykh Nizām, *Fatāwā al-‘Ālamgīriyya* (2 of 4 vols, Nawal Kishawr 1865) 997.

¹⁰⁵ KS Vikør, *Between God and the Sultan: A History of Islamic Law* (Hurst & Co 2005) 346-47; GC Kozłowski, *Muslim Endowments and Society in British India* (CUP 1985) 194.

¹⁰⁶ Al-Shaykh Nizām, *Fatāwā al-‘Ālamgīriyya* (3 of 4 vols, Nawal Kishawr 1865) 310-12. The *Hidāya* also provided that a *qāḍī* should be capable of performing *ijtihād*. However, it clarified that the

way, solutions to emerging legal problems could be provided. This is exactly what the Anglo-Indian courts did. But their sources and methodology were not confined to Islamic law. In fact, these courts are charged with stultifying Islamic law by holding to the controversial doctrine of the closure of the doors of *ijtihād*,¹⁰⁷ and strictly applying the doctrine of precedent.¹⁰⁸

The strict doctrine of precedent under English law was the product of the nineteenth century, caused by changes in legal theory associated with the rise of positivism, judicial hierarchy and a growing requirement for certainty in law to meet the requirements of state.¹⁰⁹ This principle is based on a process of judicial decisions which culminates with the final decision of the highest court of appeal.¹¹⁰ The doctrine of the closure of the doors of *ijtihād*, on the other hand, is purported to be a product of the tenth century. A historical analysis of the development of this doctrine shows its dual political functions. First, it created certainty in law suitable for

approved doctrine is that this requirement is merely preferable but not indispensable. He is also required to be familiar with the ways of life in the community. Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr 'alā al-Hidāya* ('Abd al-Razzāq Ghālib Mahdī ed, 7 of 10 vols, Dār al-Kutub al-'Ilmiyya 2003) 238-40. Grady (n 53) 334.

¹⁰⁷ E Giunchi, 'The Reinvention of Sharī'a under the British Raj: In Search of Authenticity and Certainty' (2010) 69 *The Journal of Asian Studies* 1119, 1123.

¹⁰⁸ Abdur Rahim observed, 'If a rule of Mohammedan Law is laid down by a judgment of the Privy Council or has been settled by a uniform course of decisions of the Indian High Courts, it must be accepted even though it may not agree with a proper reading of the original authorities.' A Rahim, 'A Historical Sketch of the Growth of Mohamedan Jurisprudence' (1906) 3 *Calcutta Law Journal* 109n.

¹⁰⁹ J Evans, 'Change in the Doctrine of Precedent During the Nineteenth Century' in L Goldstein (ed) *Precedent in Law* (Clarendon Press 1987) 35-72. For the earlier history of the development of the doctrine of precedent see TE Lewis, 'The History of Judicial Precedent' (1930-32) 46 *Law Quarterly Review* 207-24, 341-60, 47 *LQR* 411-27, 48 *LQR* 230-47.

¹¹⁰ L Goldstein (ed), *Precedent in Law* (Clarendon Press 1987) 4; HC Black, *Handbook on the Law of Judicial Precedents: or, The Science of Case Law* (West Publishing Company 1912) 182.

effective governance.¹¹¹ Second, it helped ‘*ulamā*’ to attain juristic autonomy by limiting the scope of state authority regarding issues covered under *Fiqh*.¹¹² After two centuries of intense intellectual activity, Muslim jurists felt the need to discipline scholarly developments by adhering to the views of earlier great jurists.¹¹³ Therefore, future scholarly endeavours were confined within the limits of existing literature. Jurists were graded in seven levels. The highest graded jurists, primarily the founders of schools of thought, enjoyed absolute capacity of expounding the law based on primary sources, while the lowest graded jurists were simply to follow the rules already laid down by other jurists of higher grades.¹¹⁴ This did not mean that answers to new legal problems could not be provided. However, solutions had to be found from within the existing literature and by the application of the already established methodology and theoretical framework.¹¹⁵ But the English judges interpreted this doctrine as if the doors of all legal developments in Islamic law were closed. This was endorsed by their presumption about *Fiqh* as religious and thus rigid and archaic. This view is reflected in judgments on the issue of waqf of shares and securities. In *Kulsoom Bibee v Golam Hossein*, Justice John Woodroffe referred to the doctrine of

¹¹¹ BS Turner, *Weber and Islam: A Critical Study* (Routledge 1974) 142. Makdisi regards the rise of government-paid jurisconsults (*mufīts*) in the thirteenth century for scholarly degeneration which limited the scope of independent reasoning because only people with ordinary credentials accepted these posts at the terms of the government. G Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981) 285, 290-91.

¹¹² Jackson (n 7) xxvii-xxxiii, 228-29.

¹¹³ This was similar to Roman law where the *responsa* of great Roman *prudentes* who had the *juris respondendi* had the character of judicial precedent. JC Gray, 'Judicial Precedents. A Short Study in Comparative Jurisprudence' (1895) 9 *Harvard Law Review* 27, 29. A Watson, *The Spirit of Roman Law* (The University of Georgia Press 1995) 149-54.

¹¹⁴ Rahim, *The Principles of Muhammadan Jurisprudence* (n 57) 182-85.

¹¹⁵ M Fadel, 'The Social Logic of Taqlīd and the Rise of the Mukhataṣar' (1996) 3 *Islamic Law and Society* 193.

the closure of the doors of *ijtihād* in order to reject Ameer Ali's view that Islamic law was capable of accommodating change.¹¹⁶

This was despite the fact that the nineteenth and early twentieth century was a period of great intellectual activity aimed at the revival of Islamic religious and legal thought. 'Ulamā' had organised themselves into institutional forms, such as the seminaries of Deoband, Nadwat ul 'Ulamā', Farangī Maḥal and Bareilī. Modernists established universities such as Aligarh and Jamia Millia Islamia. Various religious movements aimed at either revival or reformation of Islam could also be seen during this period.¹¹⁷ Reformers made full use of the printing press which had facilitated the flow of ideas.¹¹⁸ However, there was no central institutional structure that could facilitate the interaction of divergent opinion holders and help them negotiate with each other. This institutional structure was provided by the British judiciary, at least for the issues relating to law. Judges of superior courts, unlike *qāḍīs*, not only administered justice, they also laid down legal principles. This is notwithstanding the fact that in the nineteenth century English judges remained equivocal about their law making powers, and the doctrine of precedent was still undergoing its stages of

¹¹⁶ *Kulsoom Bibee v Golam Hossein* [1905] 10 CWN 449, 488. This doctrine has been subjected to criticism recently. The most important critic is Wael Hallaq. He points out the functions of *taqlīd* as continuity, stability, increased determinacy and predictability of law. He argues that Islamic law possessed an inbuilt mechanism for legal change through *muftī* (jurisconsult) and *muṣannif* (author-jurist) who together incorporated social changes into the law. WB Hallaq, *Authority, Continuity and Change in Islamic Law* (CUP 2001) xii, 239. In this line of reasoning, the two concepts of *ijtihād* and *taqlīd* are juxtaposed as complementary rather than mutually exclusive and chronologically divided into the earlier period of independent thinking and the later period of blind following or imitation. Vikør (n 105) 160-61.

¹¹⁷ KA Nizami, 'Socio-Religious Movements in Indian Islam, 1763-1898' (1970) 44 *Islamic Culture* 131; F Rahman, *Islam* (University of Chicago Press 1979) 201-06, 212-34. HAR Gibb, *Modern Trends in Islam* (University of Chicago Press 1947).

¹¹⁸ F Robinson, 'Technology and Religious Change: Islam and the Impact of Print' (1993) 27 *Modern Asian Studies* 229, 240.

birth.¹¹⁹ Judgments were reported in law journals and important decisions were also regularly discussed in the press. In this way, a public discourse developed regarding new legal principles.

This study shows that the decisions of the Indian High Courts and the Privy Council generated a public discourse about the nature and regulation of awqāf in British India. This discourse was not confined to lawyers, judges, politicians, and journalists but ‘*ulamā*’ also played an active role in it. The *fatāwā* of ‘*ulamā*’ belonging to various schools of thought were sought on controversial waqf related legal issues.¹²⁰ In some cases, these *fatāwā* were also presented as authorities in courts and the legislative councils. This is despite the fact that ‘*ulamā*’ generally kept themselves out of the British system of the administration of justice.¹²¹

Judicial law making was supplemented by legislation. The issue of the regulation of awqāf was subjected to intense legislative debates. But the colonial administrators preferred judicial law making because of its flexibility. Therefore, the so-called ‘codification’, which has been subjected to criticism by various scholars, was not the codification by the legislature as was the case in continental European

¹¹⁹ N Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 31-48; J Ram and J Townshend, *The Science of Legal Judgment: A Treatise* (A. Maxwell 1834); CS Lobingier, 'Precedent in Past and Present Legal Systems' (1946) 44 Michigan Law Review 955.

¹²⁰ A large number of *fatāwā* were issued by the ‘*ulamā*’ of Deoband seminary. They dealt with various practical aspects of waqf in India. Muftī ‘Aziz ul Rahmān Uthmānī, *Fatāwā Dār ul ‘Ulūm Deoband* (vol 13, Dār al-Ishā‘at 2009) 111-542; AA Thānwī, *Imdād ul Fatāwā* (2 of 5 vols, new edition, Maktaba Dār al-‘ulūm 2010) 552-700; MRA Gangohī, *Fatāwā Rashīdiyya* (Dār al-Ishā‘at 2003) 529-45.

¹²¹ On the validity of decision of English courts in India, a leading Indian scholar of Deoband seminary Asharf Ali Thānwī, held that they are acceptable only in order to avoid greater harm. AA Thānwī, *Imdād ul Fatāwā* (3 of 5 vols, new edition, Maktaba Dār al-‘ulūm 2010) 430-31.

civil law tradition.¹²² On the issue of the codification of Muslim and Hindu laws through legislation, the Report of the Law Commission of 1855 recommended that such laws should not be codified because the codification would obstruct gradual progress of the society. Secondly, it was argued that because both Muslim and Hindu laws derive their authority from Islam and Hinduism, a British legislature could not presume to make religion.¹²³ However, Henry Maine, who was a law member of the Governor-General's Council between 1862 and 1869, had argued for codification of Indian laws because in its absence judges were legislating under the principle of equity and expediency.¹²⁴ These views were endorsed by the first Muslim judge of the Allahabad High Court, Syed Mahmood who was a proponent of the codification of law because he saw it as a means to restrict the on-going importation of English law by the judges unacquainted with India or its traditional law.¹²⁵ He preferred legislation by the government to creation of law at the whim of individual judges.¹²⁶ Syed Mahmood's father, the famous Indian reformer Syed Ahmad Khan (1817-1898), also preferred codification because of its certainty and because it limited the discretion of judges. He criticised the uncertainty in law caused by the individual application of the

¹²² It is true that case law provided material for statutory codification. AL Diamond, 'Codification of the Law of Contract' (1968) 31 *The Modern Law Review* 361, 372.

¹²³ Second Report of Her Majesty's Commissioners: Appointed to Consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India (H.M. Stationery Office, 1856) 7-9 referred in RK Wilson, 'Should the Personal Laws of the Natives of India be Codified?' (1898) 6 *Asiatic Quarterly Review* 225, 240.

¹²⁴ HS Maine, 'Mr. Fitzjames Stephen's Introduction to the Indian Evidence Act' (1873) 19 *The Fortnightly Review* 51. He also noted the negative effect of rigidification of local laws as a result of the decisions of courts because the judges believed in the native legal principles more than native inhabitants did. HS Maine, *Village-communities in the East and West* (H. Holt & Co 1889) 44-45.

¹²⁵ Guenther (n 63) 7, 246-47.

¹²⁶ *Ibid* 303.

principle of justice, equity and fairness by judges.¹²⁷ Thus the whole project of codification was aimed at curbing the wholesale importation of English law into India. This is manifest in the observations of Lord Salisbury, the Secretary of State from 1874 to 1878:

Thus, it is said, many rules ill-suited to oriental habits and institutions, and which would never recommend themselves for adoption in the course of systematic law-making, are indirectly finding their way into India by means of that informal legislation which is gradually effected by judicial decisions. It is manifest that the only way of checking this process of borrowing English rules from the recognised English authorities is by substituting for those rules as system of codified law, adjusted to the best of Native customs and to the ascertained interests of the country.¹²⁸

However, about a century ago the intellectual father of codification, Jeremy Bentham, had advised against changing indigenous Indian customs simply because of their repugnance to English law.¹²⁹ This advice was accepted and Muhammadan law was not codified by the legislature. And as we have seen above, this gap was filled by the legal commentators who produced ‘judicial codes’ of case law.

To what extent was ‘judicial codification’ in conformity with the principles of *Fiqh*? One objection is that under the colonial influence the historical link between juristic discourses and the judicial and educational institutions was severed. This transformed *Shari‘a* from a discourse oriented process to mere ‘content’ to be applied

¹²⁷ W Stokes, *The Anglo-Indian Codes* (1 of 2 vols, Clarendon Press 1891) xxi-xxii.

¹²⁸ *Ibid* xvi-xvii.

¹²⁹ J Bowring (ed), *The Works of Jeremy Bentham* (vol 1 W. Tait 1843) Chapter III on Rules respecting the Method of Transplanting Laws in essay title ‘*Of the Influence of Time and Place in Matters of Legislation*’, 181.

blindly.¹³⁰ And that too in order to serve the interests of the colonial state. It also led to the disconnection of *Fiqh* from juristic methodology. *Fiqh* was entrapped in the English judicial system, interpreted through the methodologies of common law. The English judiciary replaced Islamic legal techniques such as *ijmā'* (consensus), *qiyās* (analogy), and *ijtihād* (independent reasoning) with their own legal methods.¹³¹ English judges increasingly used the principle of justice, equity and good conscience as a method for adjudication. Strict interpretation of classical *Fiqh* texts, which did not suit the circumstances of society, was another means to limit the application of *Fiqh*.¹³² These methodologies were transferred through legal education to the next generations.¹³³ It was under the impact of English education that Muslims who studied law employed English terminology rather than the language of *Fiqh* in expressing their views on law. In their interpretation of *Sharī'a*, the English educated Muslims followed the pattern of English law and not the pattern of traditional Muslim scholarship.¹³⁴ This was a major shift from the traditional education imparted in

¹³⁰ This observation made in the context of the Middle East equally applies to colonial India. NJ Brown, 'Sharia and State in the Modern Muslim Middle East' (1997) 29 International Journal of Middle East Studies 359.

¹³¹ J Strawson, 'Revisiting Islamic Law: Marginal Notes from Colonial History' (2003) 12 Griffith Law Review 362, 363, 377.

¹³² In one case the judges of the Privy Council observed, 'The doctrine relating to the invalidity of gifts of *mushaa* (joint property) is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.' *Sheikh Muhammad Mumtaz v Zubaida Jan* (Bengal) [1889] UKPC 36.

¹³³ Grady produced the second edition of Hamilton's translation of the *Hidāya* specifically 'for the examination of students of the Inns of Court' who intended to practice in India. Grady (n 53) v.

¹³⁴ Kozlowski (n 105) 116-18; Guenther (n 63) 54.

madāris wherein *Fiqh* formed but one portion of the whole curriculum which included a wide range of religious sciences.¹³⁵

Despite the above criticism, the English legal system opened up a new venue for legal developments in Islamic law in an unprecedented fashion. It is true that Anglo-Muhammadan law signified a disconnection with tradition. However, it reflected social, political and economic developments of the time. In the pre-colonial period there existed a parallel system of law to the one found in *Fiqh* books. These two systems were not necessarily in conflict with each other. Rather they interacted with each other and jurists incorporated the legal practices developed in the counterpart system into *Fiqh* texts. For instance, customary practices often made their way into the treatises of *Fiqh*.¹³⁶ The jurists never denied the existence of custom, judicial decisions and state legislation both theoretically and practically.¹³⁷ A *qāḍī*'s decision initiated many developments in waqf law in the Middle East, especially regarding cash waqf and the exchange of waqf property. These decisions were later provided authoritative formulation by *muftīs* who sanctioned the change beyond specific cases.¹³⁸ *Qāḍīs* have played an important role in the development of *Fiqh*

¹³⁵ GMD Sufi, *Al-Minhaj: Being the Evolution of Curriculum in the Muslim Educational Institutions of India* (Shaikh Muhammad Ashraf 1941) 73-74, 123.

¹³⁶ The *Hidāya* mentions the opinion of a few jurists who required that a *qāḍī* must have knowledge of customs because many laws are founded upon them. Ibn al-Humām (n 106) 240, Grady (n 53) 335, NJ Coulson, 'Muslim Custom and Case-Law' (1959) 6 *Die Welt des Islams* 13.

¹³⁷ Masud, *Shatibi's Philosophy of Islamic Law* (n 2) 14-15.

¹³⁸ Hoexter, 'Qāḍī, Muftī and Ruler: Their Roles in the Development of Islamic Law' (n 11) 85. During the Ottoman rule, in Tunisia and Algiers, a council representing '*ulamā*' of various schools and the state was established in order to deal with legal problems regarding which jurists held conflicting views. 82.

from its earlier history and it is also worth noting that the compilers of the *Fatāwā al-‘Ālamgīriyya* included many *qāḍīs*.¹³⁹

An earlier example of judicial practice contributing to ‘positive law’ of Islam is found in Morocco. Developments in Islamic jurisprudence in Morocco established the principle that ‘the practice of tribunals prevails over the best attested scholastic doctrine’.¹⁴⁰ Coulson calls this a ‘realist form of Islamic jurisprudence’ because it follows the decisions of the courts instead of the strict principles of *Fiqh*. It concerns with the law not as it ought to be, but the law as it is actually administered in courts.¹⁴¹ Traditional jurists rationalised this practice known as ‘*amal* (literally practice) under the doctrine of *maṣlaḥa* (common good), ‘*urf* (custom), *ḍarūra* (necessity) and avoidance of *ḍarar* (harm).¹⁴² These principles correspond to the English legal principles of public policy, custom/usage, expediency and utility.¹⁴³

This study shows that legal change under Anglo-Muhammadan law was adopted whenever a pressing need was felt for it. The overall system was not stagnant, rather it responded to social change. The law was taken out of the hands of a small

¹³⁹ AM Guenther, 'Hanafi Fiqh in Mughal India: The Fatāwā-i ‘Ālamgīrī’ in RM Eaton (ed) *India's Islamic Traditions, 711-1750* (OUP 2003) 212-29. SK Rashid, 'Analysing the Level of Maturity Attained by the Law of Waqf in Mughal India as Shown in the *Fatāwā al-‘Ālamgīriyya*' (2008) 19 & 20 *Journal of Objective Studies* 1.

¹⁴⁰ Schacht, 'Problems of Modern Islamic Legislation' (n 32) 110-11.

¹⁴¹ Coulson, *A History of Islamic Law* (n 33) 147.

¹⁴² H Toledano, *Judicial Practice and Family Law in Morocco: the Chapter on Marriage from Sijilmāsī's al-'Amal al-Muṭlaq* (Social Science Monographs 1981) 21-22. ‘*Amal* remained binding only as long as the conditions giving rise to it exist. However, in practice once a rule was established it was continuously followed, as was the case with perpetual leases of waqf property. 16-18.

¹⁴³ AHF Lefroy, 'Basis of Case-Law' (1906) 22 LQR 293.

class of jurists and placed into the institutions that could represent the various strata of society and also interact with them. These were the type of changes, which Muslim intelligentsia aspired to achieve in India. The leading eighteenth century Indian scholar, Shāh Walī Allāh (1703-1762) had argued that law develops based on custom to settle disputes, and to punish the unjust and defend against external threat. He emphasised the importance of ‘universally accepted principles’ as the basis of legislation and regarded *ijtihād* as a collective responsibility for all times.¹⁴⁴ His views inspired the later generations and many revivalist movements were based on his ideas.¹⁴⁵

One of the most influential Muslim philosophers of the twentieth century, Sir Muhammad Iqbal (1877-1938) praised Shāh Walī Allāh for being the first Muslim scholar to have felt the urge of a new spirit to ‘rethink the whole system of Islam without completely breaking with the past’.¹⁴⁶ Iqbal argued that *ijtihād* is a principle of movement in Islam. He justified *ijtihād* as a mechanism to exercise complete authority in law making. He described *ijmā’* (consensus) as an institution of *ijtihād* in which not only the jurists but also the representatives of the community participate. According to him, political and religious authority in Islam is not vested in the Caliph or ‘*ulāmā*’, rather it is vested in the Muslim community (*umma*). He proposed that the Caliphate or Imamate should be vested in a body of persons or an elected assembly.

¹⁴⁴ JMS Baljon, *Religion and Thought of Shah Wali Allah Dihlawi: 1703-1762* (Brill 1986) 167-70. For his views on *ijtihād* see the partial English translation of his work in MD Rahbar, 'Shah Wali Ullah and Ijtihad' (1955) 45 *The Muslim World* 346. MK Mas'ud, *Iqbal's Reconstruction of Ijtihad* (Iqbal Academy 1995) 49-54.

¹⁴⁵ R Pirbhai, *Reconsidering Islam in a South Asian Context* (Brill 2009) 119-73; SW Allāh, *The Conclusive Argument from God* (M.K. Hermansen tr, Brill 1996) xxxiii-vi.

¹⁴⁶ SM Iqbal, *The Reconstruction of Religious Thought in Islam* (OUP 1934) 92.

He regarded the lack of such an assembly in Islamic history as due to political circumstances, suitable to rulers who fearing that it might become too powerful instead left the *ijtihād* to individual jurists.¹⁴⁷ He praised the Turks for abolishing the old Caliphate and vesting legislative powers in an assembly and asserted: ‘The republican form of government is not only thoroughly consistent with the spirit of Islam, but has also become a necessity in view of the new forces that are set free in the world of Islam.’¹⁴⁸ He wanted ‘*ulāmā*’ to become part of the democratic process rather than giving them any privileged position to review the decisions of the legislature as was done under the Iranian constitution of 1906.¹⁴⁹ He regarded this constitutional arrangement of providing for a separate ecclesiastical committee of ‘*ulāmā*’ as dangerous and suggested that ‘*ulāmā*’ should form a vital part of a Muslim legislative assembly, ‘helping and guiding free discussion on questions relating to law.’¹⁵⁰

Sir Abdur Rahim, another prominent Muslim scholar, judge and politician, appreciated the application of the doctrine of *taqlīd* by the British Indian Courts so long as ‘it did not stand in the way of substantial justice or of the progress of laws in accordance with the requirements of an advanced society’.¹⁵¹ He argued that the juristic opinions of Muslim scholars were similar to the judge-made law under the English legal system because the authority of juristic law in Islam is presumptive and

¹⁴⁷ Ibid 164-65.

¹⁴⁸ Ibid 149.

¹⁴⁹ Ibid 166-67.

¹⁵⁰ Ibid 167.

¹⁵¹ Rahim, *The Principles of Muhammadan Jurisprudence* (n 57) 191-92.

a judge or jurist is not bound to follow a particular opinion if he regards that to be based on incorrect deduction.¹⁵²

Justice Mahmood asserted the flexible nature of *Fiqh* and argued that *Fiqh* should be adapted to the needs of the Muslim community. He accepted flexible English evidence and procedural law as abrogating similar provisions of *Fiqh*.¹⁵³ He advocated strict adherence to *Fiqh* in matters of worship (*'ibādāt*) while greater flexibility in interpretation in secular matters.¹⁵⁴ There were also voices for modernisation of classical *Fiqh* by making a sharp distinction between religious affairs (*'ibādāt*) and civil matters (*mu'āmlāt*), the latter were to be interpreted widely. One Muslim scholar Delawarr Hosaen Ahmad of Bengal who was identified as a Mu'tazilī¹⁵⁵ Mussalman in his article published in the *Aligarh Institute Gazette* in 1877 proposed a radical reform by severing law from religion. According to him religious truths transcend human understanding, while laws were amenable to human experience. He argued that unless laws were modified and improved, a society governed by immutable laws was destined to be overtaken by a society whose civil laws were constantly improved and remodelled to reflect increasing human

¹⁵² Ibid 54-55.

¹⁵³ *Mazhar Ali v Sudh Singh* [1885] 7 ILR All 297. This case was related to the presumption of death of a missing person. The Ḥanafī law required a period of ninety years while the Indian Evidence Act 1872 provided a period of seven years.

¹⁵⁴ Guenther, *Syed Mahmood* (n 63) 301-2.

¹⁵⁵ *Mu'tazila* was a rationalist school of thought founded in Iraq in the eighth century. "Mu'tazila." *Encyclopaedia of Islam*, Second Edition. Brill Online, 2013. http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/mutazila-COM_0822, accessed 3 April 2013.

experience and knowledge.¹⁵⁶ In the later half of the twentieth century, Fyzee also supported the separation of law and religion.¹⁵⁷

Fyzee attributed the evident stagnation of Muhammadan law to two factors: the doctrine of *taqlīd* among later Muslim jurists, and the common law doctrine of precedent which required British judges to interpret and follow the law, rather than expand or develop it. According to him, during the two centuries of British rule in India, these two factors had ‘the effect of keeping the law stationary and static except for two broadening influences: legislation and the healthy introduction of the principles of the English equity’. For this he blamed the majority of Muslims who being orthodox were ‘averse to any change in the ‘holy’ *Sharī‘at*’.¹⁵⁸ In the first edition of his treatise, Fyzee had put the blame on the Government which did not want to interfere with the personal law of various communities for fear of their dissatisfaction.¹⁵⁹

This study shows that waqf law did not remain stagnant in colonial India. Legal developments took place through adjudication and legislation. This was despite the fact that references were made to both the doctrine of *taqlīd* and precedent, and the rhetoric of Islam was used to promote elite interests at the cost of legal change. Although the colonial government resisted putting in place a regulatory setup for

¹⁵⁶ Guenther, *Syed Mahmood* (n 63) 179-81.

¹⁵⁷ AAA Fyzee, 'Islamic Law and Theology in India: Proposals for a Fresh Approach' (1954) 8 Middle East Journal 163, 180-81.

¹⁵⁸ AAA Fyzee, *Outlines of Muhammadan Law* (3rd edn OUP 1964) 50-51.

¹⁵⁹ Fyzee, *Outlines of Muhammadan Law* (n 38) 39.

awqāf on account of avoiding harm to the religious feelings of the orthodox majority, it yielded to persistent pressure. Meanwhile the judiciary kept on developing legal principles aimed at the effective governance of awqāf. Judicial intervention in family awqāf was successfully resisted through the enactment of the Mussalman Wakf Validating Act 1913. However, it unintentionally opened up the way for legal developments through the judicial interpretation of this Act and further legislative enactments.

The rest of this thesis is divided into four chapters. Chapter 1 provides a factual analysis of waqf related cases decided by the Privy Council. It identifies different types of waqf and shows that various historical, legal and political factors played an important role in giving rise to awqāf in different provinces of India. Chapter 2 examines the cases on family awqāf. It shows that the Privy Council decision of invalidating family awqāf in 1894 was based on the English rule against perpetuities. However, this was never explicitly stated and a majority of English judges pretended to have interpreted Islamic law in reaching their decision on this point. This leads to the question of why it was that the judiciary and not the legislature was so keen to apply the policy-based rule against perpetuities. An answer is found in Chapter 3, which deals with the discourse on regulation of awqāf. It shows that the colonial administrators deliberately adopted law making through adjudication because of its flexibility. Given the intricate involvement of public/private and religious/secular elements in awqāf, official interference in their administration was regarded as dangerous as early as in the 1830s. Therefore, administrative control of public endowments was replaced with judicial control. However, it failed to stop embezzlement of endowed funds and voices were raised for effective state regulation.

But the government refused to intervene and rejected a number of legislative proposals aimed at providing official control of endowments. Meanwhile, changes in procedural laws were introduced in order to facilitate judicial control of endowments. Eventually a general legislation was passed in 1920 and various provincial legislatures promulgated their own laws to regulate awqāf. Chapter 4 explores the issue of accommodation of social change under Islamic law as applied by the British Indian Courts. It examines the extension in the subject matter of waqf by analysing the judicial and legal discourse on the issue of waqf of shares and securities. As shares and securities were a new type of property, they were not discussed in the classical texts of Islamic law. Initially, judges refused to accept such waqf as valid. Muslim legal commentators such as Ameer Ali, Abdur Rahim and Tyabji argued that such waqf was valid, and that Islamic law accommodates social change. This issue also involved debates about the permissibility of interest (*ribā*) under Islamic law and its enforcement by the British Indian Courts. *Fatāwā* (legal opinions) of '*ulamā*' were issued to establish the validity of such waqf. In the end, courts validated waqf of shares and securities along with other movable property. This episode reflects the role of various actors in the making of Anglo-Muhammadan law. Finally, the conclusion shows that the result of interaction between substantive Islamic law and procedural English law was the hybrid Anglo-Muhammadan law. It was formulated through the processes of legislation, translation, adjudication and legal commentaries. Indian Muslims not only interacted, collaborated and negotiated with the colonial administrators in these processes, they also resisted when the colonial legislators and judges misapplied or misinterpreted Islamic law. Despite replacing the traditional institutional structure, the new legal system provided a forum to different stakeholders in order to interact and negotiate amongst themselves. As a result, law responded to

social change through the interaction of a large number of stakeholders who represented divergent interests and held different views.

Chapter 1

Practice of Waqf in British India

Social necessities and social opinion are always more or less in advance of law.¹
Henry Maine

1. Introduction

The waqf (pl. awqāf) has been described as the most important legal institution in the Islamic world. It provided the foundation for Islamic civilization, as it was interwoven with the entire religious life and the social economy of Muslims.² From mosques, schools and hospitals to highways, bridges, markets and inns, most of the public sector was financed through awqāf. The waqf provided the only permanent organisational form under Islamic law.³ Therefore, the waqf was the most suitable legal form for financing long lasting services. Small wonder that the entire sector of public services in the Muslim world was managed through awqāf before the advent of

¹ HS Maine, *Ancient Law* (first published in 1861, 4th ed, John Murray 1870) 24.

² PG Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafī Legal Discourse* (Brill 2004) xiii; SA Ali, *Mahommedan Law* (Law Publishing Company 1976 (first published in 1892)) 192-93. Colin Imber goes to the extent of stating that without public awqāf, Islam and Islamic society could have neither functioned nor survived. C Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh University Press 1997) 141-42.

³ Similar institutions existed before the advent of Islam amongst the Byzantines in the form of *piae causae*; Romans in the form of *res sacrae* and *fidei commissum*; Jews in the form of *heqdēsh*; and Persians in the form of *pat ruvan* or *ruvānagān*. For an interesting discussion on the origins of waqf and the impact of these institutions on it see PG Hennigan (n 2) 50-70. Also see RC Deguilhem-Schoem, 'History of Waqf and Case Studies from Damascus in Late Ottoman and French Mandatory Times' (PhD Thesis, New York University, 1986) 49-70.

the modern state in the twentieth century.⁴ Interestingly, the waqf was not limited to the provision of public services. A large number of waqf properties were reserved in favour of the founder and his/her family members, generation after generation. However, even in such private awqāf, the ultimate beneficiaries were the poor of society or public services. Therefore, the waqf as an institution encompasses both private and public functions.⁵

Literally waqf means detention, and it stems from the Arabic root verb ‘*waqafa*’, which means ‘to stop’ or ‘to hold’.⁶ Under Islamic law, it refers to an institutional arrangement whereby the founder endows his property in favour of some particular persons or objects. Such property is perpetually reserved for the stated objectives and cannot be alienated by inheritance, sale, gift or otherwise. In the organisational structure of a waqf, there are three major parties. The founder or settlor is called the *wāqif*, who creates a waqf either by writing or pronouncing his/her intention to make a waqf of his/her property in favour of the beneficiary or beneficiaries. The beneficiaries are called *mawqūf ‘alayh*, who, according to some jurists must be capable of owning property. A waqf can also be created for a specific purpose, eg the promotion of religious education or the welfare of the needy and the poor. The third party is the administrator or trustee, called the *mutawallī*, who

⁴ G Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981) 40; T Kuran, *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System* (2001) 35 *Law & Society Review* 841, 842.

⁵ It is not possible to translate the term ‘waqf’ into a single English word because it conveys a myriad of meanings. Sometimes a waqf is translated as a ‘charitable trust’, which has a public dimension and at other times it is translated as an ‘endowment’, which resembles a ‘will’ or ‘settlement’ that has a private dimension. GC Kozlowski, *Muslim Endowments and Society in British India* (CUP 1985) 1-2.

⁶ Al-Fayyūmī, *Al-Miṣbāḥ al-munīr* (Dār al-Ma‘ārif 1977); H Wehr, *A Dictionary of Modern Written Arabic* (Spoken Languages Services, Inc 1976).

administers the waqf according to the conditions laid down by the founder. The *qāḍī* performs the duty of supervision over the waqf by keeping a check on the administrator. A specialised government department (*dīwān*) to govern public awqāf is also found as early as the Umayyad dynasty (661-750 A.D).⁷

The administrative structure of awqāf in India before the British occupation was similar to that used in other Muslim countries.⁸ There is evidence about the existence of awqāf in favour of mosques, *madāris*, *dargāh* (shrine) and tombs. The monumental *Tāj Maḥal* building was established as a waqf. The emperor himself was its *mutawallī* and the revenue from several villages was dedicated to its maintenance.⁹ However, we do not find documentary evidence for the existence of family awqāf, called *waqf ‘alā al-awlād* in Arabic and *waqf khāndānī* in Persian, in pre-colonial India.¹⁰ This led Kozłowski, whose work focused on private awqāf in British India, to argue that the family waqf was a product of the English legal system. But we find frequent references to this type of waqf in the legal texts which were used during the Mughal era.¹¹ Moreover, the categorisation of waqf into either public or private was in itself a product of the British period. An archetypal waqf was a mixture of public and private interests, though awqāf in favour of mosques and other religious and

⁷ Muḥammad ibn Yūsuf Kindī, *The Governors and Judges of Egypt, or, Kitāb el ‘umarā’ (El wulāh) wa Kitāb el Quḍāh of El Kindī* (Brill 1912) 346.

⁸ SK Rashid, *Waqf Administration in India: A Socio-Legal Study* (Vikas Publishing House 1978) 3-10.

⁹ I Habib, *The Agrarian System of Mughal India 1556-1707* (2nd edn OUP 1999) footnote 77, 359.

¹⁰ Kozłowski (n 5) 40. Habib (n 9) 358-59, first edition, 312-13.

¹¹ Al-Marghīnānī, *Al-Hidāya* (Muḥammad ‘Adnān Darwīsh ed, 3 of 4 vols, Dār al-Arqam 1997); Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr ‘alā al-Hidāya* (‘Abd al-Razzāq Ghālib Maḥdī ed, 6 of 10 vols, Dār al-Kutub al-‘Ilmiyya 2003); Al-Shaykh Nizām, *Fatāwā al-‘Ālamgīriyya* (2 of 4 vols, Nawal Kishawr 1865).

public places could be distinguished from a typical family waqf which functioned as a family settlement. But the remainder in this family settlement was reserved for public charity.

The aim of this chapter is to examine the practice of awqāf in British India. It provides a factual analysis of awqāf mentioned in the Privy Council judgments. It starts with a description of the Privy Council judgments handed down between the second half of the nineteenth century and the mid twentieth century. These cases came not only from various provinces of India, but also from all over the Muslim populated areas of the British Empire. This analysis of awqāf, however, is limited to the Indian cases. An effort has been made to deconstruct various types of interests in awqāf by classifying them in accordance with the extent of public or private interest involved in each waqf. This helps to engage with Kozlowski's above mentioned thesis. There were significant differences in the property law regime in various provinces of India. Therefore, this chapter also analyses the various types of awqāf in the context of each province. It shows that the development of awqāf in British India was affected by multiple factors, law being one of them. The influence of political and judicial developments on awqāf was significant, as the colonial policy towards land and the judicial interpretation of waqf law affected the creation of various types of awqāf. To build a better understanding of the interaction of law, politics and history on awqāf, the twenty-four private awqāf found in this data set of Privy Council cases are separately analysed. The motivations of each of the settlors of these awqāf are also explored. Major legal problems and issues relating to the various types of awqāf have been identified in order to analyse them in the following chapters. In this way, this

chapter sets the stage for a legal analysis of the waqf cases decided by the Privy Council and various Indian High Courts.

2. Privy Council Judgments on Awqāf

This chapter is based on the judgments of the Judicial Committee of the Privy Council, which was the highest court of appeal in the British Empire. While the British assumed control of Bengal in the last quarter of the eighteenth century and the courts of the East India Company operated during the seventeenth century, the hierarchical judicial system in various provinces of India was established only in 1862.¹² The High Court or the Court of Judicature was the highest court of appeal at the provincial level while lower courts were established at district and sub-district levels. An appeal from a decision of the High Court could be made directly to the Privy Council in London since the Federal Court was not established at the central level until during the last days of British rule in India.¹³ In pre-colonial India, Hindus and Muslims followed their personal laws in family affairs. Commercial transactions were governed by customary practices as well as by reference to Hindu and Muslim laws. Administrative law was based on the edicts of rulers. The judicial system was based on multiple layers governing various communities and different aspects of life.¹⁴ The British political system replaced this system with a uniform judiciary,

¹² Various Indian High Courts came into existence at different times. The Bengal, Bombay and Madras High Courts were the oldest. They were established in 1862 under the High Courts Act 1861. Allahabad High Court was established in 1866. Chief Courts were established in the Punjab, Sind, the Central Provinces, Oudh and Coorg between 1861 and 1866. Patna High Court was established in 1916 for the provinces of Bihar and Orissa after the rearrangement of the province of Bengal in 1912. H. H. Dodwell (eds) *The Cambridge History of India*, Vol 6 (The Indian Empire 1858-1918) (CUP 1932) 379-81.

¹³ MP Jain, *Outline of Indian Legal History* (2nd edn N. M. Tripathi 1966) 4-5.

¹⁴ AAA Fyzee, 'Muhammadan Law in India' (1963) 5 *Comparative Studies in Society and History* 401;

which applied the personal laws of various religious communities along with new laws based on English legal principles.¹⁵

This thesis explores the legal contribution of the Privy Council to the law of waqf, which cut across various branches of law such as property law, family law and administrative law. The close resemblance of the waqf with the English trust makes it a perfect subject in order to explore the interaction between Islamic law and English law during the nineteenth and early twentieth century. Cases on waqf law came to the Privy Council from all over the Muslim populated territories of the British Empire. However, the number of cases from India was the highest. After 1915 a separate division in the Privy Council was established to hear appeals from India.¹⁶ In the period between 1840 and 1968, the Privy Council decided sixty-nine cases in which the dispute involved a waqf. Out of these cases, fifty-eight originated from India. The eleven other cases came from Palestine, Burma, Ceylon, Eastern Africa and Mauritius.

Table 1

Jurisdictional Division of Privy Council Cases

India	58
Palestine	3
Burma	3
Ceylon	2

MB Ahmad, *The Administration of Justice in Medieval India* (The Aligarh Historical Research Institute 1941); MB Ahmad, *The Judicial System of the Mughal Empire* (Historical Society 1978); A-HMUIS Jung, *A Dissertation on the Administration of Justice of Muslim Law* (K. P. Dar 1926).

¹⁵ India also provided a laboratory in order to test the codification of English law in the nineteenth century. BK Acharyya, *Codification in British India* (S. K. Banerji & Sons 1914); MC Setalvad, *The Common Law in India* (Stevens & Sons Limited 1960); B McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library 2007).

¹⁶ Jain (n 13) 459.

Eastern Africa	2
Mauritius	1
Total	69

Waqf related cases originated from almost all provinces of India, though their number varied from province to province, and as could be expected more cases came from Muslim majority provinces.

Table 2

Jurisdictional Division of Indian Cases¹⁷

Bengal	14
Punjab	11
Oudh	11
North West Province	9
Bombay	4
Bihar	4
Central Provinces and Berar	2
Madras	1
North West Frontier	1
Sind	1
Total	58

In addition, there were twelve cases in which reference was made to a waqf but the case did not fall under waqf law. These cases mostly involved Hindu endowments in favour of an idol or *mutt* or *debutter* or *dharmashala* (religious sanctuary or rest house). There is only one exception in which private interests were mixed with religious and charitable purposes. In this case a moneylender and *zamindār* established a testamentary waqf in February 1904 by appointing a committee under his eldest son for religious and charitable purposes, which included the establishment

¹⁷ It is worth noting that the territorial distribution of India into various provinces and the jurisdiction of various High Courts were subjected to changes from time to time for various administrative and political reasons. These cases are divided into various provinces in accordance with the description of the name of the province in the Privy Council judgment. East India (Statistical Abstract) from 1897-98 to 1906-07 (Wyman and Sons Ltd 1908).

of a *dharmashala*.¹⁸ These cases are not included in the detailed analysis of awqāf here, but reference is made to them wherever it is necessary.

The judgments of the Privy Council played a significant role in the judicial and legal system of British India. Therefore, the seminal work of Kozlowski on Muslim endowments (awqāf) in British India takes into account the leading judgments of the Privy Council. Kozlowski did not limit himself to the reported judgments, but he also explored the case records. These case records contained documents filed with the Privy Council by the parties to the case, as well as the records prepared by the lower courts and High Courts, eg statements of witnesses and court orders. These documents were sent to the Privy Council in the form of the ‘paper book’.¹⁹ Studying these documents enabled Kozlowski to more closely examine the social context of each Privy Council waqf case. However, his analysis was limited to only a few Privy Council judgments primarily related to family awqāf.

This research is therefore the first comprehensive study of waqf-related cases decided by the Privy Council. An effort has been made to find every important case on waqf decided by the Privy Council by looking into law reporting journals and legal commentaries. Online databases such as *Manupatra*, Westlaw, and Bailii have also been explored to this end. As is shown above, these cases were not confined to India. Rather, they originated from all over the Muslim populated territories of the British Empire. As the decisions of the Privy Council applied all over the Empire, this study

¹⁸ *Lala Jai Narain v Lala Ujagar Lal* (Allahabad) [1924] UKPC 81.

¹⁹ Kozlowski (n 5) 89, 111.

takes into account all these cases. Relevant cases regarding other areas of Islamic personal and property law have also been discussed wherever necessary. In addition reference is made to relevant cases decided by the Privy Council under other laws such as Hindu law, Buddhist law and Parsi law.

Before we start a quantitative analysis of these cases, it is important to note the limitations of this data. Firstly, this data set is relatively bigger than Kozlowski's data set which included only forty waqf deeds which are supplemented with twenty-five lawsuits 'dealing with allied questions of inheritance, debt and family relations'.²⁰ Yet still any statistical analysis based on fifty-eight cases could not be seen to form any conclusive argument. Therefore, following the example of Kozlowski who makes a similar disclaimer,²¹ this work presents the material collected from this data as suggestive rather than conclusive. Secondly, the sample in this data set is also not without its bias because only a small number of awqāf were actually litigated upon. However, in the absence of the records of registration of waqf deeds, the judicial records are the best source in order to study awqāf in British India. An advantage of the focus on the decisions of the Privy Council is that it provides the most authoritative exposition of law based on the cases coming from almost every part of

²⁰ Ibid 41. Kozlowski described the availability of information in the legal archives as the primary reason for his selection of forty waqf deeds. But one report on Muslim endowments dated 1888 contained more than fifty waqf deeds. These awqāf were primarily public and Kozlowski's primary focus was on family awqāf. Therefore, he did not include that report in his data set. See Report of the Muhammadan Educational Endowments Committee (BS Press 1888). This report is discussed in detail in chapter 3 on regulation of awqāf.

²¹ Kozlowski (n 5) 41.

India and the rest of the British Empire.²² But the problem of relying on such cases is that only a limited number of overall cases came to the Privy Council because of legal and financial limitations on the right to appeal. Only cases involving higher than a certain pecuniary limit could be appealed. A certificate that the case was fit for appeal to the Privy Council was also required from the High Court which decided the case. If a High Court refused to issue such a certificate, an application for a special leave to appeal could still be filed before the Privy Council. A large number of petitions were filed for this purpose.²³ In addition the appellant was also required to file a bond to fulfil his obligations and also bore legal costs of documentation and lawyers before his appeal could be heard. Even after incurring all these costs the appellant was not sure that the case would be decided within his/her lifetime because there was a large list of pending suits before the Privy Council. There is no exact data on the chances of success of appeals before the Privy Council. In this data set, more appeals were dismissed than were allowed. The overall ratio of successful appeals was thirty-five per cent (35%). Twenty-four appeals were allowed while forty-two were dismissed. In two cases, the appeal was partially allowed.²⁴ And in one case, the decision of the High Court was discharged and the case was remitted with a direction to draw a scheme of the waqf.²⁵ The success rate for appeals from India was slightly better,

²² Section 596 of the Civil Procedure Code 1882 specified that an appeal to the Privy Council could only be made if it involved some substantial question of law, where the High Court had affirmed the decree of the lower court.

²³ T Preston, *Privy Council Appeals: A Manual Showing the Practice and Procedure in Colonial and Indian Appeals before the Lords of the Judicial Committee* (Eyre & Spottiswoode 1900) 21.

²⁴ *Ibrahim Esmael v Abdool Carrim Peermamode* (Mauritius) [1908] UKPC 31, AC 526; and *Musammat Ali Begam v Badr-ul-Islam Ali Khan* (Lahore) [1938] UKPC 22.

²⁵ *Mahomed Ismail Ariff v Hajee Ahmed Moola Dawood* (Lower Burma) [1916] UKPC 40, 18 BLR 611.

thirty-eight percent (38%) of all appeals (twenty-two allowed, one partially allowed and thirty-five dismissed).

A more ambitious attempt could have involved all the cases decided by the Indian High Courts. An electronic search on the Indian case law database, *Manupatra*, under the word 'wakf' shows nine hundred and four cases decided before 1950 by the Indian High Courts.²⁶ The number of cases decided by the Privy Council during the same period is shown as one hundred and one. This means that every ninth case decided by the Indian High Courts went on to appeal in the Privy Council. This finding is subject to the limitation in an electronic system that picks up every case that contains the word 'wakf', though the actual dispute may have nothing to do with a waqf. Though the inclusion of these cases in a doctoral project might not be an impossible task, the retrieval of the case records in the archives of various Indian High Courts and the analysis of the facts of each case would have involved a longer period of time and a more voluminous project. As the primary focus of this study is on the developments in the law of waqf, an attempt has been made to take into account the High Court cases by including two types of sources. First, there are legal digests of case law that provide subject-classified headnotes of judgments.²⁷ Secondly, there are legal treatises on Anglo-Muhammadan law, which provide a commentary on law by making it systematic for the use of lawyers and judges.²⁸ In

²⁶ <http://www.manupatrafast.com/pers/Personalized.aspx> accessed 10 July 2012.

²⁷ BD Bose, *A Digest of Indian Law Cases containing High Court Reports, 1862-1909: and Privy Council reports of Appeals from India, 1836-1909* (3 of 6 vols, Superintendent Government Printing, India 1912) 7887-7920; DV Chitale and N Ramaratnam, *The Fifty Years' Digest, 1901-1950* (Civil, Criminal & Revenue) (11 of 14 vols, Digest Publications 1952) 1392-1590.

²⁸ WH Macnaghten, *Principles and Precedents of Moohummudan Law* (3rd edn first published in 1825, J. Higginbotham 1864); SA Ali, *Mahommedan Law* (Law Publishing Company 1976 (first published in

addition, every relevant Indian High Court judgment referred to in the Privy Council decisions has been taken into account. Therefore, the qualitative data analysed in this study embraces sources beyond the Privy Council cases.

Fortunately, in most of the cases the date of the creation of waqf is mentioned. However, in twenty-two cases the date of the creation of the waqf is not mentioned. These are mostly the cases of old awqāf in favour of mosques, *imambara* (Shī‘a religious place for holding of meetings to commemorate the martyrdom of Imām Husayn), graveyards, public road, *khānqāh* (monastery/abbey), shrines and tombs. Some cases refer to more than one waqf deed, created either by the same person or different persons at different times. Four of the cases involved three different waqf deeds each.²⁹ In all these cases the waqf deeds were closely linked to each other, so as to constitute one waqf. Therefore, the distinction between the number of waqf cases and the number of awqāf does not make much difference. A further complication is added when a particular waqf is adjudicated more than once. These details are discussed later in the below paragraphs. The available data is summarised in the table below:

1892)); RK Wilson, *A Digest of Anglo-Muhammadan Law* (1st edn W. Thacker & Co. 1895); DF Mulla, *Principles of Mahomedan Law* (Thacker & Co. 1906); FB Tyabji, *Principles of Muhammadan Law* (2nd edn Butterworth & Co 1919); AAA Fyzee, *Outlines of Muhammadan Law* (1st edn OUP 1949); F Husain, *The Musalman Law of Wakf* (Central India Printing Works 1939).

²⁹ Two of them originated in Bengal, and one each from Oudh and Bihar (Patna High Court). *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153; *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm* (Bengal) [1947] UKPC 84, AIR 1948 PC 76; *Mirza Sajjad Husain v Nawab Wazir Ali Khan* (Oudh) [1912] UKPC 41; *Abadi Begum v Bibi Kaniz Zainab* (Patna) [1926] UKPC 92, 54 IA 33.

Table 3
Dates of the Creation of awqāf

Before 1850	12
Between 1851-1900	24
Between 1900-1950	15

This pattern of the creation of awqāf confirms Kozlowski's finding that British rule caused the rise of private awqāf in India for two reasons: first, the strict application of Islamic inheritance law on all types of movable and immovable property by the British Indian Courts; and second, the introduction of a private property regime for land under colonial rule and its enforcement by state institutions. The rise in the number of awqāf between 1850 and 1900 can be attributed to these legal changes and the subsequent decline could have resulted from the developments in waqf law under the British legal system, which refused to recognise family awqāf as a legitimate institution in the late nineteenth century. The string of cases questioning the validity of such awqāf started from the 1870s culminated in 1894 with the Privy Council judgment invalidating family awqāf. Such awqāf remained invalid for two decades before the promulgation of the Mussalman Wakf Validating Act 1913. But the Act did not have retrospective effect. Even when it was given retrospective effect in 1930, the courts remained sceptical about the validity of private interests in awqāf. However, the public/private distinction in awqāf was not that simple and straightforward. In a number of cases the drawing of this distinction was precisely the controversy that was to be resolved by the courts. The following section addresses this issue.

3. Public/Private Distinction

The most difficult issue faced by judges in the British Courts was to establish a public/private distinction in cases of Muslim endowments. The prototype of public

waqf was a mosque with no private interests while the paradigm example of a family waqf was a settlement in favour of oneself and one's children generation after generation with ultimate dedication to a mosque or the poor of a community. However, even in cases of a waqf in favour of a mosque the settlor or his descendants could be the hereditary *mutawallī* with a hefty salary. This salary at times consumed a substantial part of the income of the waqf.³⁰

The traditions of the Prophet and the earliest *Fiqh* treatises did not distinguish between a family waqf and a public waqf, though the term waqf '*alā al-awlād* (in favour of children) appears in the earliest treatises on waqf written in the ninth century.³¹ We also find the terms waqf *khāṣ* (special) and waqf '*ām* (general) in classical *Fiqh* texts.³² The later treatises used the terms waqf *ahlī* and waqf *khayrī* to denote family waqf and charitable waqf respectively.³³ However, no separate rules were developed for these two types of awqāf apart from some distinction in procedural issues. The *qāḍī* had broader powers to supervise the waqf '*ām/khayrī* (general/charitable) as against the waqf *khāṣ/ahlī* (special/family).³⁴ The exact distinction between the two types remained elusive because the private and public interests were intermixed in each type. This reflects the social context in which

³⁰ The waqf deed of Nazir Dost Mahomed Khan allocated one-third of its income for the *mutawallī* from generation to generation. Deed of waqf reproduced in the Report of the Muhammadan Educational Endowments Committee (n 19) xviii.

³¹ Aḥmad ibn 'Umar al-Khaṣṣāf, *Kitāb Aḥkām al-awqāf* (Maktabat al-Thaqāfat al-Dīniyya 1904); Hilāl al-Rā'y, *Kitāb Aḥkām al-waqf* (Maṭb'āt Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya 1937).

³² Al-Māwardī, *al-Aḥkām as-Sultāniyya (The Laws of Islamic Governance)* (Assadullah ad-Dhaakir Yate tr, Ta-Ha Publishers Ltd 1996) 124-25.

³³ Muḥammad Qadrī Bāshā, *Qānūn al-'adl wa-al-inṣāf lil-qaḍā' 'alā mushkilāt al-awqāf* (first published in 1893, Dār al-Salām 2006).

³⁴ Al-Māwardī (n 32) 124-25.

classical Islamic law developed. In that context, a sharp distinction between public and private interests could hardly be drawn because of the collectivist structure of the society. Further complexity was added because the family waqf was used to circumvent Islamic inheritance law. In fact family waqf became an important part of what scholars describe as the 'Islamic inheritance system'.³⁵ It was also used for multiple purposes, which included protection against confiscation by the state, tax evasion and protection from creditors. On the other hand, the public waqf was used by the Muslim community to establish their high status in society and as a sign of their public benefaction.³⁶

Some researchers have identified a third category of awqāf and called it quasi-public waqf.³⁷ Awqāf in which public and private interests are mixed could be classified under this category. However, this categorisation is only partially useful because it does not help identify the extent of public or private interests in a particular waqf. For instance, we are unable to identify the dominating objective of a mixed waqf. Therefore, we need a more elaborate categorisation of awqāf in order to tackle this issue. As an alternate, one could draw awqāf on a spectrum that has public and private interests on extreme ends. This would be useful to demarcate public and private interests in a particular waqf. However, this would only furnish a temporary

³⁵ DS Powers, *Studies in Qur'ān and Ḥadīth: The Formation of the Islamic Law of Inheritance* (University of California Press 1986); DS Powers, 'The Islamic Inheritance System: A Socio-Historical Approach' (1993) 8 *Arab Law Quarterly* 13; H Yanagihashi, 'The Doctrinal Development of "Marāḍ al-Mawt" in the Formative Period of Islamic Law' (1998) 5 *Islamic Law and Society* 326; Hennigan (n 2).

³⁶ Kozlowski (n 5) 51; G Baer, 'The Waqf as a Prop for the Social System (Sixteenth-Twentieth Centuries)' (1997) 4 *Islamic Law and Society* 264.

³⁷ Ali (n 28) 391; A Majid, 'Wakf as Family Settlement among the Mohammedans' (1908) 9 *Journal of the Society of Comparative Legislation* 122, 127.

solution to this problem given the complicated mixture of public and private interests in awqāf. Thus it would be hard to assign a waqf a particular place on the spectrum. In order to mitigate this problem, the following categorisation is proposed:

1. Pure Public: in which the settlor does not reserve any interest for himself or his family members.
2. Substantially Public/Partially Private: In this type some interest is reserved for the private members but their share is only partial while the substantial portion of the income of the waqf is dedicated for a public purpose.
3. Pure Private: in this waqf the settlor or his family is the primary beneficiary of the waqf, generation after generation, though the ultimate benefit is reserved for a mosque or the poor of a community or any other public utility.
4. Substantially Private/Partially Public: in this type the waqf is created in favour of a charitable and religious purpose for the benefit of the public but the substantial income of the waqf goes to the settlor or his family members or relatives.³⁸

³⁸ Neither the Privy Council nor various Indian High Courts laid down any criterion for the determination of 'substantial interest' in a waqf. The Bengal Wakf Act 1934 and the United Provinces Muslim Waqfs Act 1936 defined the waqf '*alā al awlād*' (family waqf) in which not less than 75% of the net income of the waqf was reserved for the *wāqif* (settlor) or his family members or descendants generation after generation.

5. Fictitious or sham: this category includes both Public and Private awqāf. Ostensibly the waqf fulfils all legal requirements but the real intention of the settlor is to defraud creditors or legal heirs.

A large number of cases in my data set can be classified under the above categories. However, there are certain awqāf, which do not fit into any of them. For instance, Muslim rulers gave lands as *madad-i-ma'āsh* (aid/assistance for subsistence) grants in recognition of the need, piety, learning and nobility of the recipient. This is provided in a chapter under the heading *suyurghāl* in the famous book of Emperor Akbar's minister, Abū al-Faḍl.³⁹ Such grants could also be made in cash. The land and cash grants were covered under a general term *suyurghāl*.⁴⁰ These grants maintained *madāris* and '*ulamā*'.⁴¹ They were conferred upon the members of a particular family and were hereditary. The grantee was to spend the income according to his discretion.⁴² There was also a category of *lākharaj* land tenures.⁴³ Such grants and tenures resembled waqf because of the element of public interest in them. But some grants were purely personal, such as *chakran* which was a grant to officials in lieu of

³⁹ Abū al-Faḍl, *Ā'yn-i Akbarī* (H. Blochmann tr, 1 of 3 vols, Asiatic Society of Bengal 1873) 268-70. GC Kozłowski, 'Imperial Authority, Benefactions and Endowments (Awqāf) in Mughal India' (1995) 38 *Journal of the Economic and Social History of the Orient* 355.

⁴⁰ NA Siddiqi, *Land Revenue Administration under the Mughals (1700-1750)* (Asia Publishing House 1970) 123-28.

⁴¹ Another term used for grants to religious and spiritual guides is *a'ima*. Habib (n 9) 342.

⁴² The Endowment of Nazir Dost Mahomed Khan for a mosque and *madrassa*; the Endowment of Meer Ehya for a mosque, *madrassa*, students and beggars; the Bohra Endowment; the Sasseram Endowment for the maintenance of a *khānqāh* in the Report of the Muhammadan Educational Endowments Committee (n 19) xviii, xx-xxii.

⁴³ This category resembled the waqf *irṣād* in the Middle East. KM Cuno, 'Ideology and Juridical Discourse in Ottoman Egypt: The Uses of the Concept of Irṣād' (1999) 6 *Islamic Law and Society* 136.

their salaries.⁴⁴ A Commission appointed in 1776 by Hastings, called the Amini Commission, for the collection of material for a new revenue settlement of Bengal showed that there were thirty-nine varieties of grants in the fiscal division of Dacca, the capital of Bengal. Waqf was one of them.⁴⁵ Following the tradition of previous rulers, the British Governor Generals also made such grants of land.⁴⁶ A large number of such grants were made in favour of individuals.⁴⁷

These grants could hardly be adjusted within the law of waqf contained in the *Hidāya* and the *Fatāwā al-‘Ālamgīriyya*. They could, however, be justified under state or customary law. When the British took over control of Bengal in 1772, they found that about one fourth of the total land holdings had been transferred from the State in the form of such grants.⁴⁸ The legal nature of these grants as to whether they constituted a waqf or not, was disputed in courts.⁴⁹ Without entering into the

⁴⁴ M Huq, *The East India Company's Land Policy and Commerce in Bengal, 1698-1784* (Asiatic Society of Pakistan 1964) 95. *Al-tamghā* and *in ‘ām* grants were also given to officials. Habib (n 9) 358.

⁴⁵ AM Waheeduzzaman, *Land Resumption in Bengal, 1819-1846* (PhD Thesis, University of London 1969) 14, 17. A separate department regulated and controlled these grants under the Mughal Empire. I. Habib (n 9) 343, 359 (waqf a separate category of grant in favour of institutions).

⁴⁶ GK Dandekar, *The Law of Land Tenures* (N. M. Tripathi 1912) 95-96.

⁴⁷ Waheeduzzaman (n 45) 14.

⁴⁸ WW Hunter, *The Indian Musalmans* (3rd edn Trübner and Co. 1876) 185. Another writer describes the proportion of rent-free lands as two-thirds. JH Harington, *An Elementary Analysis of the Laws and Regulations enacted by the Governor General in Council at Fort William in Bengal* (2 of 6 vols, The Honorable Company's Press 1814-15) 82.

⁴⁹ In one case it was held that a settlement in which no religious purpose at all was expressed was not a valid waqf. This was a case of *in ‘ām grant* dated 1651-52 conferred on a pious person and his children for praying for the perpetuity of the government of Shah Jahan. *Mahamed Ali v Sayad Gohar Ali* [1882] 6 ILR Bom 88.

controversy, I have categorised such grants as Official Grants.⁵⁰ We also have some public awqāf which were recognised as valid under the principle of long user.⁵¹ They included mostly mosques and graveyards.⁵² They have been generally categorised under public awqāf.

4. Criteria for the Classification

In order to classify a particular waqf under one category or the other, firstly the waqf deed is looked into. Secondly, the decision of the court is considered. Thirdly, the facts of the case along with the available evidence mentioned in the judgment are taken into account. In most cases, enough information is provided either in the waqf deed or the judgment, and where such information is not available, the documents filed with the Privy Council, technically called the ‘paper book’ have been explored. Paper books contained all the documentary evidence including the recorded statements of witnesses.

The following table shows the categorisation of awqāf found in sixty-eight cases. In one case from Patna,⁵³ enough information was not available in order to classify it under any of the categories.

⁵⁰ The Waqf Act 1954 acknowledged a grant as a valid category of waqf though neither the Wakf Act 1923 nor the Waqf Acts in Bengal, United Provinces and Bombay accepted a grant as a valid waqf.

⁵¹ Waqf by user was accepted as a valid category under the Bengal Wakf Act 1934 and the United Provinces Muslim Waqfs Act 1936.

⁵² The graveyard is a waqf by user. The Court of Wards for the Property of Makhdum Hassan Bakhsh v Ilahi Bakhsh (Lahore) [1912] UKPC 88.

⁵³ *Bibi Aesha v Mohammad Abdul Kabir* (Patna) [1931] UKPC 41.

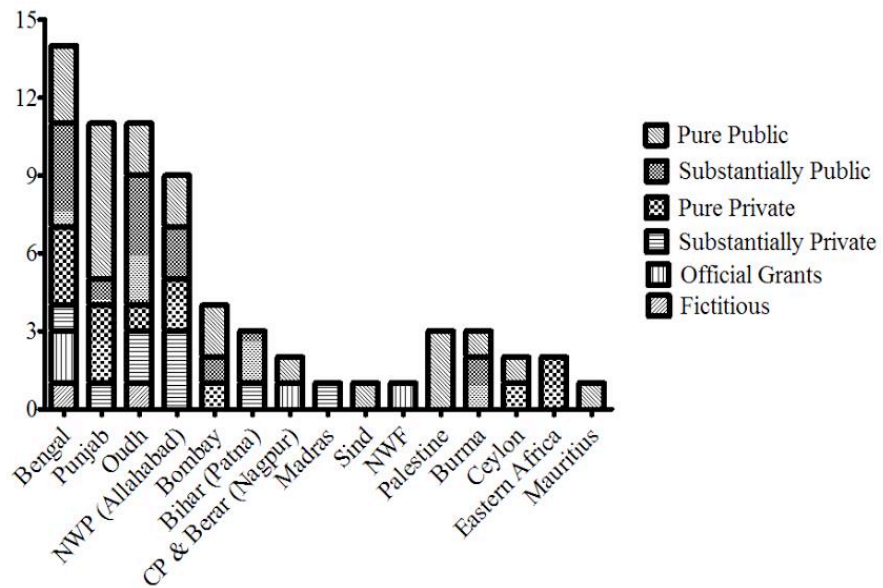
Table 4
Composite Table of Waqf Cases

Jurisdiction	Pure Public	Substantially Public	Pure Private	Substantially Private	Fictitious	Official Grants
Bengal	3	4	3	1	1	2
Punjab	6	1	3	1	Nil	Nil
Oudh	2	5	1	2	1	Nil
NWP (Allahabad)	2	2	2	3	Nil	Nil
Bombay	2	1	1	Nil	Nil	Nil
Bihar (Patna)	Nil	2	Nil	1	Nil	Nil
CP & Berar (Nagpur)	1	Nil	Nil	Nil	Nil	1
Madras	Nil	Nil	Nil	1	Nil	Nil
Sind	1	Nil	Nil	Nil	Nil	Nil
NWF	Nil	Nil	Nil	Nil	Nil	1
Palestine	3	Nil	Nil	Nil	Nil	Nil
Burma	1	2	Nil	Nil	Nil	Nil
Ceylon	1	Nil	1	Nil	Nil	Nil
Eastern Africa	Nil	Nil	2	Nil	Nil	Nil
Mauritius	1	Nil	Nil	Nil	Nil	Nil
Total	23	17	13	9	2	4

This table shows that overall the number of public awqāf was almost double the number of private awqāf. The two fictitious awqāf included one ostensibly public and the other fraudulent private.⁵⁴ The four official grant cases involved three public awqāf and one private waqf.⁵⁵ The same data is shown in the form of a graph below:

⁵⁴ *Sheik Mahomed Ahsanulla Chowdhry v Amarchand Kundu* (Bengal) [1889] UKPC 56, 17 IA 28; *Maharajah Sir Mohammad Ali Mohammad Khan v Musammat Bismillah Begam* (Lucknow) [1930] UKPC 76.

⁵⁵ *Jewun Doss Sahoo v Shah Kubeer-ood-Deen* (Bengal) [1840] UKPC 20, 2 MIA 390; *Syed Mahammed Mazaffar-Al-Musavi v Bibi Jabeda Khatun* (Bengal) [1930] UKPC 1; *Muhammad Raza v Syed Yadgar Hussain* (Nagpur) [1924] UKPC 7; *Sardar Abdul Rahman Khan v Sardar Mohammad Ashraf Khan* (North West Frontier) [1943] UKPC 53.



The most interesting fact arising out of this data is the comparable number of private awqāf in the different Indian provinces despite there being substantial differences in territory and population. For instance, Bengal was five times bigger than Oudh in terms of area and four times bigger in terms of population during the late nineteenth and early twentieth century.⁵⁶ Despite marginal differences, the number of private awqāf in Bengal, Punjab, Oudh and North West Province is fairly similar even when the difference between the pure private and the substantially private awqāf is taken into account. This poses a serious challenge to one of the main findings of Kozlowski who did not come across any private waqf in the Punjab, which was one of the Muslim majority provinces in British India. Kozlowski attributes this absence to the existence of inheritance related customary practice in the Punjab. These customary

⁵⁶ East India (Statistical Abstract) from 1897-98 to 1906-07 (Wyman and Sons Ltd 1908) 1.

practices prevailed over Islamic inheritance law and prevented the division of land among legal heirs, especially females.⁵⁷ This endorsed Kozlowski's main thesis that the private waqf developed due to the strict application of Islamic inheritance law by the British Indian Courts. However, it contradicts the second part of Kozlowski's thesis that regards the rise of private awqāf as a result of the private property law regime for land introduced by the British, which involved state enforcement of credit contracts. While Kozlowski argues that the impact of property law in the Punjab was limited, we find that rural indebtedness was the worst in the Punjab in comparison with other provinces. Around 80% of the population of the Punjab was indebted. This ratio was 60% in Central Province; 22% in Agra district; 40% in Nagpur; 40% in Baroda; 55% in Faridpur (Bengal); and 37% in Mysore State. In the Punjab more than 50% of debt was incurred by Muslims from Hindu or Sikh moneylenders.⁵⁸ These statistics make Darling conclude that 'the bulk of the cultivators in Punjab are 'born in debt, live in debt, and die in debt'.⁵⁹ This might have given rise to private awqāf as a device to protect property from creditors despite the fact that the British Indian courts did not strictly apply Islamic inheritance law in the Punjab.

However, it is misleading to read the above table without taking into account the differences in the property law regimes in various Indian provinces and the different dates of the creation of various types of awqāf. In the following paragraphs,

⁵⁷ Kozlowski, *Muslim Endowments* (n 5) 42. Kozlowski has rightly noticed that in a large number of cases from the Punjab, the public waqf did not involve private interests. Thus we have the highest number of pure public awqāf in the Punjab.

⁵⁸ ML Darling, *The Punjab Peasant in Prosperity and Debt* (4th edn, Manohar Book Service 1977) 5-6 and 19-20.

⁵⁹ *Ibid* 277.

awqāf from each province are analysed separately in order to have a better understanding of the practice of awqāf in British India.

Before an analysis of these cases starts, it should be noted that one of the puzzling questions that the British faced in India was to define rights in land. The pre-colonial legal regime for land was a strange mixture where multiple parties held competing interests in land. The British tried to redefine proprietary rights in land by taking into account who was liable to pay land revenue. If there was no intermediary between the government and the actual holder of the land, this was called *raiyyatwari* holding. It prevailed in Bombay and Madras. In contrast, where the Government recognised one or two grades of intermediary ‘proprietors’ between itself and the landholders, the system was called *talugdari*. It was prevalent in Oudh. These two were the paradigm examples. The actual system was much complex and was subject to changes in various provinces over time.⁶⁰ The focus in this chapter is primarily on inheritance law.

Bengal

Type	No	Established in
Pure Public	3	1855, 1858, ancient
Substantially Public	4	1850, 1854, 1859, 1894
Pure Private	3*	(1846, 1868, 1881)**, 1868
Substantially Private	1	(1876, 1880, 1908) ***
Fictitious (public)	1	1864
Official Grant	2	1717, (1772, 1773) ****
Total	14	

⁶⁰ The Imperial Gazetteer of India, vol 4 (Clarendon Press 1909) 204-41. For details see BH Baden-Powell, *The Land-Systems of British India* (3 vols, Clarendon Press 1892); BH Baden-Powell, *A Manual of the Land Revenue Systems and Land Tenure of British India* (Office of the Superintendent of Government Printing 1882) especially Book I, 3-106. For a shorter version see BH Baden-Powell, *A Short Account of the Land Revenue and its Administration in British India; with a Sketch of the Land Tenures* (2nd edn, Clarendon Press 1907).

- * One waqf is adjudicated twice, the actual number of pure private awqāf is two.
- ** Three waqf deeds are mentioned in one case. But this is regarded as one waqf since all three were related to each other.
- *** Three waqf deeds are mentioned in one case. But this is regarded as one waqf since all three were related to each other.
- **** One case refers to two grants.

According to Kozlowski's thesis, there should be a relatively larger number of private awqāf related cases in Bengal for three main reasons. First, Bengal had a relatively larger Muslim population in comparison with other provinces. Second, it was the first Indian province that fell under British control. Third, the strict application of Islamic inheritance law started in Bengal as early as 1793. However, Bengal was not different from other provinces in terms of the number of private awqāf cases. As the above table shows, there were three pure private and one substantially private awqāf cases in Bengal. As one pure private waqf was adjudicated twice, the actual number of private awqāf cases in Bengal was three. This is not very different from the Punjab where the number of pure private and substantially private awqāf cases is the same. However, as is mentioned above, the private property regime in the Punjab was very different because there Islamic inheritance law did not apply on agricultural land. There was another important difference between Bengal and the Punjab. The Punjab fell under British control about a century later than the Bengal. Therefore, the impact of the English legal system in the Punjab should have been relatively smaller in comparison with Bengal.

It must be clarified here that the situation would be different if we take into account the actual number of awqāf in Bengal, rather than the number of waqf cases. In that case, the actual number of private awqāf in Bengal is almost double the

number of such awqāf in the Punjab. There were seven private awqāf in Bengal: four pure private and three substantially private, as against four private awqāf in the Punjab: three pure private and one substantially private. The reason for this difference is that three waqf deeds are mentioned in each of the two cases from Bengal. However, a closer analysis of both cases shows that in each case, the multiple awqāf were linked to each other and there was not much difference as to the nature of each waqf deed.⁶¹

The impact of the new legal regime could be determined from the dates of the creation of various types of awqāf. An analysis of the pattern of the creation of private awqāf shows mixed results. Firstly, it appears that the 1793 Regulations, which provided for the application of Islamic inheritance law in Bengal, did not cause the rise of family awqāf immediately. Most of the private awqāf in Bengal were established after the second half of the nineteenth century. In the above table, we find three cases of pure private awqāf. One case that was adjudicated twice refers to three waqf deeds, executed in 1846, 1868 and 1881.⁶² There is only one case that involved substantially private waqf. It refers to three waqf deeds executed in 1876, 1880 and 1908.⁶³ In one case, which is categorised as a fictitious waqf case, the waqf deed was executed in December 1864. The waqf purported to be a pure public waqf for religious and charitable purposes in favour of a mosque and two *madāris*. However,

⁶¹ *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153; and *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm* (Bengal) [1947] UKPC 84, AIR 1948 PC 76.

⁶² *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153; *Nawab Khajeh Habibullah Saheb v Raja Janaki Nath Roy* (Bengal) [1929] UKPC 98.

⁶³ *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm* (Bengal) [1947] UKPC 84, AIR 1948 PC 76.

the primary beneficiaries of the waqf were the family members of the settlor who drew benefits as the *mutawallī*.⁶⁴ This was the famous *Ahsanullah* case in which the Privy Council questioned the validity of family awqāf for the first time in 1889. Five years later, the Privy Council declared family awqāf invalid in the *Abul Fata* case. This case also originated from Bengal. The waqf in this case was established in 1868.⁶⁵ We find that this decision prevented the establishment of private awqāf in Bengal. The only private waqf established in the post *Abul Fata* period is dated 1908 and it too appeared to be a substantially private rather than a pure private waqf. Moreover, it was linked to two earlier family waqf deeds.⁶⁶

Kozlowski's theory is that the family waqf arose in India as a result of the new legal regime introduced by the British in the nineteenth century. However, awqāf existed in favour of mosques, *madāris* and other public utilities from the early days of Islam all over the Muslim world. In fact awqāf played such an important role in Muslim societies that Professor Colin Imber remarked that without them Muslim societies could have neither functioned nor survived.⁶⁷ According to the Ḥanafī theory, once a mosque is established it has to exist in perpetuity even though the mosque might no longer be used because of a change of circumstances such as depopulation of the area surrounding the mosque. Perpetuity is also one of the

⁶⁴ *Sheik Mahomed Ahsanulla Chowdhry v Amarchand Kundu* (Bengal) [1889] UKPC 56, 17 IA 28.

⁶⁵ *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry* (Bengal) [1894] UKPC 64, 22 IA 76.

⁶⁶ *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm* (Bengal) [1947] UKPC 84, AIR 1948 PC 76.

⁶⁷ Imber (n 2) 141-42.

fundamental conditions of a valid waqf. Therefore, one should expect public awqāf to be older than private awqāf.

Indeed we find public awqāf to be relatively older than private awqāf in Bengal. Four public awqāf, three for mosques and one for *taziadārī* (ceremonies to commemorate the martyrdom of Imām Ḥusayn) etc, were created in 1850, 1854, 1858 and 1859 respectively. One waqf in favour of a mosque was created in 1894. Another waqf of a mosque is described as ancient. Two awqāf cases involved official grants. The grant in the first case was dated 1717 and the second case refers to two grants dated 1772 and 1773. The first was in favour of a *khānqāh* (monastery/abbey) and the second included a mosque in the waqf property. Another substantially public waqf was created in 1772.

Though the public awqāf were relatively older than the private awqāf, we do not find many public awqāf established before 1765 except one ancient mosque and an official grant of 1717. The year 1765 is important because in this year the East India Company won the right to collect revenues in Bengal, Bihar and Orissa under the Allahabad Treaty after its victory in the battle of Buxar. This was followed by complete control of these provinces in 1772.⁶⁸ What became of the public awqāf established in the period before the British occupation of Bengal? There is evidence that a large number of public endowments were confiscated by the East India Company after the British took control of Bengal. The usual method of confiscation

⁶⁸ The Company acquired revenue collection rights as a *dīwān* and the supervision of civil and criminal justice remained with the Nawab. BB Misra, *The Central Administration of the East India Company, 1773-1834* (Manchester University Press 1959) 108-10.

by Company officials was to require documentary proof for the waqf. As most public awqāf were established in earlier periods, it was hard to furnish such evidence.⁶⁹

The East India Company spent a hefty sum of £800,000 upon ‘Resumption proceedings’ by establishing Special Courts in 1828 which worked for the next eighteen years in order to recover state lands held on grants. The output was worth the effort: £300,000 additional annual revenue was gained permanently by the Company.⁷⁰ This resumption of revenue free lands was one of the leading causes of the major uprising against British rule in 1857.⁷¹ Bengal was also at the forefront during the uprising in 1857. However, within a few months the British regained control of Bengal. This caused a major redistribution of property rights, as properties owned by rebels were confiscated and the state became the owner of land after the reconquest.⁷² There were, however, four public awqāf which were established before 1857 and continued to exist afterwards.

The evidence from Bengal shows that it was not simply the law that had an impact on awqāf but political developments equally influenced their creation.

⁶⁹ In one case it was held that ‘[n]o documentary evidence was shown to prove that the waqf was validly established. Such an establishment was not satisfactorily proved.’ Therefore, the waqf was declared invalid. *Bindersoondree Dassea v Mehroonissa Khatoon* [1853] SDA 69. See Waheeduzzaman (n 45); Kozlowski, *Muslim Endowments* (n 5) 39-40.

⁷⁰ Hunter (n 48) 185.

⁷¹ Sir Syed Ahmad Khan, *Risāla Asbāb-e Baghāwat-e Hind* in Sa-D Quraishi (ed), *Causes of the Indian Revolt: Three Essays* (Sang-e-Meel Publications 1997) 50, 76.

⁷² *Mussamat Humeeda v Mussamat Budlun* (Bengal) [1872] UKPC 33, 17 Cal WR Civ Rul 525. Petition of Muslims dated December 1876, from Mahommedan Society of Delhi on the occasion of the Imperial Assemblage at Delhi (1 January 1877), requested the Viceroy for the restoration of religious endowments and the places of worship confiscated after the Mutiny. IOR Private Papers/Mss Eur C643.

Unfortunately, this political context did not receive appropriate attention in Kozłowski's analysis. The loss of public awqāf, which maintained Muslim religious and educational institutions, was one of the causes of unrest amongst Indian Muslims. The educational system of Muslims in pre-colonial India was maintained through grants of lands by rulers. However, the British revenue officers confiscated such lands. It led to the collapse of the educational system.⁷³ Hunter, who tried to understand the causes of this unrest, describes the grievances of Muslims as follows:

They accuse us [British] of having brought misery into thousands of families, by abolishing their Law Officers, who gave the sanction of religion to the marriage tie, and who from time immemorial have been the depositaries and administrators of the Domestic Law of Islam [*Fiqh*]. They accuse us of imperilling their souls, by denying them the means of performing the duties of their faith. *Above all, they charge us with deliberate malversation of their religious foundations, and with misappropriation of the largest scale of their educational funds...*⁷⁴

The story of awqāf in Bengal shows that multiple factors affected their creation and development. Law was one of the factors, but certainly it was not the only factor. This point is further confirmed by waqf cases from other Indian provinces, as is shown below.

Punjab

Sr. No	Type	No	Established in
1	Pure Public	7	1772, 1895
2	Substantially Public	1	1887
3	Pure Private	3	1907, 1917, 1926
4	Substantially Private	1	1855
5	Fictitious	Nil	
Total		12	

⁷³ Hunter (n 48) 185-86.

⁷⁴ Ibid 148-49 (emphasis added).

Out of the total of twelve cases from the Punjab, three are pure private awqāf while one is substantially private. The fact that all three pure private awqāf were created in the first quarter of the twentieth century suggests that they might have resulted from the private property regime introduced by the British.⁷⁵ But why did it take the Punjabi landlords more than half a century after the arrival of the British in the Punjab in 1849 to protect their estates by the use of family awqāf?

Kozlowski did not come across any family waqf in the Punjab. This strengthened his thesis that the rise of private awqāf was a reaction to the strict enforcement of Islamic law of inheritance. As mentioned earlier, in the Punjab customary practices rather than Islamic inheritance law governed agricultural land of the deceased. Hence there was no need to establish private waqf in order to circumvent Islamic inheritance law.⁷⁶ But indebtedness of landowners, which led to the transfer of agricultural land into the hands of moneylenders, was most common in the Punjab. The rural indebtedness problem became acute in the last quarter of the nineteenth century. The landowners thus had an incentive to establish family awqāf even in the absence of a strict application of Islamic inheritance law by the courts. This should have prompted the rise of family awqāf in the Punjab. Kozlowski does not engage with this issue. A further complication is added because the Punjab Alienation of Land Act 1900 prohibited the permanent alienation of land to

⁷⁵ *Balla Mal v Ata Ullah Khan* (Lahore) [1927] UKPC 61; *Mohammad Ismail v Hanuman Parshad* (Lahore) [1938] UKPC 63; and *Beli Ram & Brothers v Chaudri Mohammad Afzal* (Lahore) [1948] UKPC 35.

⁷⁶ Kozlowski, *Muslim Endowments* (n 5) 42.

moneylenders from agriculturalists and also limited usufructuary mortgages to twenty years or the life of the mortgagor. The effect of this Act was further strengthened by three more statutes. First, the Restitution of Mortgaged Lands Act 1938 required the return of the land mortgaged before 1901 to its original (agriculturalist) owners. Second, the Registration of Moneylenders Act 1938 required the production of a list of officially designated moneylenders. Third, the Punjab Alienation of Land (Second Amendment) Act 1938 banned *benami* (anonymous) transactions, making it difficult for moneylenders to filter their money through agriculturalists. These three Acts were called ‘Golden Acts’, obviously for the agriculturalists who benefitted from them at the cost of moneylenders.⁷⁷ Thus there was no need for the agriculturalists of rural areas to establish a family waqf after 1900. Still, family awqāf might have been created in urban areas as a shield to protect property from creditors.

It is important to note that the subordination of Islamic inheritance law to customary practices was not prevalent all over the Punjab. There were differences between urban and rural areas. The former to a certain extent adhered to Islamic inheritance law as against the latter.⁷⁸ Small wonder that the three family awqāf cases mentioned above comprised urban properties. The only substantially private waqf was established in 1855 and it also comprised urban property.

The number of public awqāf in the Punjab was double the number of private awqāf. The same was the case in Bengal. But as against three pure public awqāf in

⁷⁷ MJ Nelson, *In the Shadow of Shari’ah: Islam, Islamic Law and Democracy in Pakistan* (Hurst & Company 2011) endnotes 108, 314.

⁷⁸ Report on the Punjab Codification of Customary Law Conference (Superintendent, Government Printing, Punjab 1915). Nelson (n 77) 76-77.

Bengal, there were six such awqāf in the Punjab. Only one was a waqf in favour of a mosque, two were awqāf of shrines, one of an ancient graveyard, one a right of way and one *khānqāh*. The only substantially public waqf was in favour of a *sarai* (rest house). This waqf was created in 1887. The waqf of the mosque was established in 1772. The dates of the creation of the rest of the public awqāf are not mentioned.

One probable reason for the survival of a large number of pure public awqāf in the Punjab could have been the relatively lesser part that this province played in the 1857 uprising. Not only did the Punjab remain relatively peaceful during the uprising, but the troops from this province also helped British forces suppress the uprising in other provinces.⁷⁹ But this factor is marginalised by the fact that despite being one of the Muslim majority provinces in India, the Punjab was ruled by Sikhs before it was conquered by the British, unlike Bengal. The famous case of the Shaheed Ganj mosque shows that awqāf did not receive much protection under Sikh rule and even that mosques were not spared from confiscation.⁸⁰

The above discussion shows that the new legal system introduced by the British provided one reason for the establishment of private awqāf in urban Punjab. The legal protection provided to the agricultural landowners might be one of the causes for the absence of family endowments in rural Punjab in addition to the absence of the application of Islamic inheritance law. The relatively larger number of

⁷⁹ TR Holmes (ed), *The Mutiny* in *The Cambridge History of India*, Vol 6 (The Indian Empire 1858-1918) (CUP 1932) 167, 190-92. JW Kaye, *A History of the Sepoy War in India, 1857-1858* (vol 2, W. H. Allen 1870) 472-73.

⁸⁰ *Masjid Shahid Ganj v Shiromani Gurdwara Parbandhak Committee Amritsar* (Lahore) [1940] UKPC 21.

public awqāf in the Punjab may be attributed to the political history of this province, which did not experience the effects of the 1857 uprising, unlike Bengal.

Oudh

Sr. No	Type	No	Established in
1	Pure Public	2	(1868, 1898, 1902)*, unknown
2	Substantially Public	5**	1848, 1866, 1890, 1892
3	Pure Private	1	1922
4	Substantially Private	2	1911, 1914
5	Fictitious (private)	1	1916
Total		11	

* Three waqf deeds are mentioned in one case. But this is regarded as one waqf since all three were related to each other.

** One waqf is adjudicated twice.

In Oudh the only pure private waqf was established in 1922 and the two substantially private awqāf were created in 1911 and 1914. One fictitious waqf was a family waqf, created in 1916. As was the case in Bengal and the Punjab, the number of public awqāf in Oudh was almost double the number of private awqāf. Most of the public awqāf are related to *imāmbāra* and the performance of religious services. One waqf was related to the maintenance of a mausoleum and the other was a waqf of graveyard. The oldest public waqf was founded in 1848, and the others were founded in 1866, 1890, 1892 and 1902.

The difference in the pattern of the development of private and public awqāf is noticeable in Oudh. All the private awqāf were created in the first quarter of the twentieth century while public awqāf were mostly created in the nineteenth century. The delayed arrival of private awqāf in Oudh could be attributed to section 22 of the Oudh Estates Act 1869, which provided the rule of primogeniture for *Taluqdars* (landholders) and section 3 of the Oudh Laws Act 1876, which gave customs priority

over Islamic inheritance law.⁸¹ The effect of these statutes was also strengthened by the establishment of the Court of Wards under the Oudh Encumbered Estates Act 1870.⁸² The effect of the redistribution of property rights in Oudh after the 1857 uprising is more visible as there is only one waqf that was established in 1848.⁸³ The private property rights were annulled in Oudh after its annexation after the 1857 uprising.⁸⁴

North West Province (Allahabad High Court)

Sr. No	Type	No	Established in
1	Pure Public	2	1813
2	Substantially Public	2	1837, 1908
3	Pure Private	2	1881, 1889
4	Substantially Private	3	1909, 1913, 1915
5	Fictitious	Nil	
Total		9	

In the North West Province, two pure private awqāf were created in 1881 and 1889 while the three substantially private awqāf were established in 1909, 1913 and 1915. The North West Province is the only province in which the number of private awqāf is greater than the number of public awqāf: five private against four public awqāf. Two substantially public awqāf were founded in 1837 and 1908. The former was in

⁸¹ In one case from Oudh, the Privy Council noted that by family custom women do not inherit and accepted it as valid. *Sardar Nisar Ali Khan v K. B. Sardar Mohammad Ali Khan* (Lucknow) [1932] UKPC 32.

⁸² F Robinson, *Separatism Among Indian Muslims: The Politics of the United Provinces' Muslims, 1860-1923* (OUP 1974) 17. For further details see JCW Sykes, *A Compendium of the Law Specially Relating to the Taluqdars of Oudh* (Thacker, Spink & Co 1886) especially introductory remarks, 1-65. Early debates about taluqdari system in Oudh and the process which led to the passing various land related laws see R Sarvadhikari, *The Taluqdari Settlement in Oudh* (Thacker, Spink & Co 1882).

⁸³ *Nawab Umjad Ally Khan v Mohumdee Begum* (Oudh) [1867] UKPC 41, 11 MIA 517.

⁸⁴ Lord Canning in his proclamation of 15 March 1858 declared that the property rights in Oudh were confiscated to the British Government, which would dispose of them in such manner as it may deem fitting. See a copy of the Proclamation reproduced in Sykes (n 82) 378-80.

favour of the servants of the settlor while in the latter, one of the beneficiaries of the waqf was Aligarh College. One of the pure public awqāf was an ancient *dargāh* (shrine) and the other was a mosque built in 1813.

As was the case in other provinces, here the public awqāf were older than the private awqāf with the exception of one substantially public waqf which was established in 1908. There were two public awqāf established before the 1857 War.

It is useful to note that the North Western Provinces came into existence as an administrative unit in 1836. In 1856, after the annexation of Oudh, they became part of the larger province of North Western Provinces and Oudh. In 1902, the new larger province was renamed the United Provinces of Agra and Oudh. Under the Government of India Act 1935, the name was shortened to the United Provinces.⁸⁵ In this chapter, while putting the cases under one province or the other, the information provided in the beginning of each Privy Council judgment regarding the provincial origins of the case has been taken into account.

Bombay

Sr. No	Type	No	Established in
1	Pure Public	2	Unknown
2	Substantially Public	1	1917
3	Pure Private	1	1838
4	Substantially Private	Nil	
5	Fictitious	Nil	
Total		4	

⁸⁵ Imperial Gazetteer of India (Clarendon Press 1908) 72.

In Bombay the only Private waqf was established in 1838. This is the oldest pure private waqf mentioned in the Privy Council cases. The two pure public awqāf were related to a mosque and other properties used as a rest house for pilgrims and other religious and charitable purposes of the Dawoodi Bohra Community. The date of the creation of the waqf is not mentioned in both cases. The substantially public waqf was founded in 1917 by a woman in favour of a mosque. The substantial income of the property (five-ninth) was dedicated for the mosque and she was to receive the remaining four-ninths as the *mutawallī*.⁸⁶

Bihar (Patna High Court)⁸⁷

Sr. No	Type	No	Established in
1	Pure Public	Nil	
2	Substantially Public	2	1873, 1917
3	Pure Private	Nil	
4	Substantially Private	1	(1882, 1897, 1907) *
5	Fictitious	Nil	
Total		3	

* Three waqf deeds are mentioned in one case. But this is regarded as one waqf since all three were related to each other.

In Bihar the only substantially private waqf involved three waqf deeds executed in 1882, 1897 and 1907. A mosque, *imāmbāra* and other religious and charitable purposes are mentioned as the objects of the waqf, but substantial income was reserved for the *mutawallī* as annual remuneration of Rupees 1,500 out of the total

⁸⁶ *Ruhulla alias Hakim Hamad v Hassanalli Degumia* (Bombay) [1928] UKPC 41.

⁸⁷ It must be noted that the Patna High Court was established in 1916 for the provinces of Bihar and Orissa after the rearrangement of the province of Bengal in 1912. Dodwell (n 12) 379-81.

income of the property worth Rupees 19,000.⁸⁸ Interestingly, the last two awqāf were created after the Privy Council had declared the family waqf invalid in 1894. This perhaps provides one explanation for mentioning the religious and charitable purposes as the primary objects of the waqf in the deed, though it was in fact a private waqf. The two substantially public awqāf were created in 1873 and 1917 respectively. A mosque, *imāmbāra* and *khānqāh* were the primary objects of these awqāf.

Central Provinces and Berar (Nagpur High Court)

Sr. No	Type	No	Established in
1	Pure Public	1	Unknown
2	Substantially Public	Nil	
3	Pure Private	Nil	
4	Substantially Private	Nil	
5	Fictitious	Nil	
6	Official Grant	1	1840
Total		2	

In Central Provinces and Berar, one pure public waqf was established in favour of tombs of the Dawoodi Bohra Community. The date of establishment of this waqf is not mentioned. The other waqf was an official grant dated 1840 issued by a Hindu Raja in favour of an *imāmbāra*.

Madras, North West Frontier Province and Sind

We have one case each from Madras, North West Frontier Province (NWFP) and Sind. One substantially private waqf was created in 1893 in Madras. The case from Sind involved a *dargāh* (shrine). The date of the creation of this waqf is not

⁸⁸ *Abadi Begum v Bibi Kaniz Zainab* (Patna) [1926] UKPC 92, 54 IA 33.

mentioned. One case from NWFP involved the grant of a *jāgīr* (the right to receive land revenue) and the dispute involved the succession of the *jāgīr* and the rights of legal heirs.

Waqf outside India

Cases related to waqf decided by the Privy Council came from five different jurisdictions in addition to India. The number of pure private awqāf is three, two from Eastern Africa and one from Ceylon. There were six pure public awqāf, three from Palestine and one each from Burma, Ceylon and Mauritius. There were two cases of substantially public awqāf, both originated from Burma.

The pure private awqāf were created in 1904 (from Ceylon), 1942 and 1946 (from Eastern Africa). Three pure public awqāf were related to mosques. One mosque was built in 1854 (from Burma). The date of the creation of the waqf is not provided in the rest of the cases of pure public awqāf. Two substantially public awqāf were established in Burma in 1865 and 1914.

The above discussion has explored the pattern of the creation of various categories of awqāf in the political and legal context of each province in colonial India. In order to avoid entering into unnecessary details that have no bearing upon the topic under consideration, this context has not been provided in the cases of provinces which did not have a large number of awqāf cases. Similarly, this context is omitted for jurisdictions outside India. At this stage, it is obvious that no clear pattern emerges in the formation of awqāf other than the finding that the number of public awqāf was approximately double the number of private awqāf, and that generally a

large number of the former were established before the latter. It is also found that both law and politics had an influence on the pattern of the creation of awqāf. In order to further explore the interaction between law and the pattern of the creation of awqāf, the following section focuses on the general pattern of the making of private awqāf in British India.

5. Law and the Creation of Private Awqāf

This data set includes a total of twenty-four private awqāf from India. Two of them were created before 1850 while eleven were created during each of the fifty years period between 1850-1900 and 1900-1950. In addition there were two fictitious awqāf in favour of the founder's family. One purported to be a public waqf established in 1864 in Bengal⁸⁹ and the other was a private waqf created in 1916 in Oudh to defraud creditors.⁹⁰

Table 5
Dates of the Creation of Private awqāf

Before 1850	2
Between 1850-1900	11
Between 1900-1950	11
Total	24

The data in the above table is neutral with respect to political and legal developments. While analysing awqāf from various provinces, we observed that the pattern of the creation of awqāf was affected by various political and legal developments. As mentioned earlier, the uprising in 1857 was the most significant political event after

⁸⁹ *Sheik Mahomed Ahsanulla Chowdhry v Amarchand Kundu* (Bengal) [1889] UKPC 56, 17 IA 28.

⁹⁰ *Maharajah Sir Mohammad Ali Mohammad Khan v Musammat Bismillah Begam* (Lucknow) [1930] UKPC 76.

the British took control of Bengal in 1772. The Privy Council's decision to declare the family waqf invalid in 1894 was the most significant legal development for awqāf in British India. This was followed by the enactment of the Mussalman Wakf Validating Act 1913, which removed the effect of the Privy Council decision. This Act was given a retrospective effect in 1930. Legal changes also took place in the property law regime at both central and provincial levels during this period. Some of these changes have already been mentioned in the above analysis. The following analysis focuses on the legal developments, which were directly linked to waqf law.

It is notable that the number of private awqāf increased between 1857 and 1894. During this period, we have nine private awqāf: six pure private and three substantially private. The number of public awqāf established during the same period is ten: four pure public and six substantially public. This is an exception in the general trend in this data set, where the number of public awqāf is double the number of private awqāf.

Between 1894 and 1913, the private waqf remained illegal. Therefore, we expect a steady decline in the making of private awqāf during this period. However, we find six private awqāf created during this period: one pure private and five substantially private. The decision of the Privy Council in 1894 appeared to have no significant effect on the making of private awqāf. This is a startling finding because the Privy Council judgment in 1894 caused a stir amongst Muslims. This judgment was depicted as an attack on Islamic law. It led to an intense mobilisation of Muslim judges, lawyers, politicians, journalists and '*ulāmā*'. They demanded that a statute should be passed by the Imperial Legislative Council to set aside the decision of the

Privy Council.⁹¹ It is hard to imagine that the founders of these private awqāf or their legal advisors were ignorant of the legal developments during this time because the issue was highly publicised in print media, both English and vernacular. It is possible that a few of them might have been ignorant of the law and the rest might have hoped that their endowments would never go to courts for adjudication or enforcement. But more surprising is the fact that the Mussalman Wakf Validating Act 1913 also did not have a huge impact. In the period after 1913 until 1950, we find only six private awqāf: three pure private and three substantially private. There were several reasons for the decline in the number of awqāf after the 1913 Act. First, the Privy Council refused to give this Act a retrospective effect until another Act was passed to this effect in 1930. Secondly, the family waqf did not remain tax free, since courts did not regard it as religious and charitable. Thirdly, in the 1920s and 1930s several provincial statutes required registration of awqāf including family awqāf in order to closely supervise them. Therefore, the benefits previously offered by family awqāf were no longer available.

Table 6

Impact of Legal Developments on the Creation of Private awqāf

Before 1894	12
Between 1894 and 1913	6
Between 1913-1950 (inclusive)	6
Total	24

The higher number of private awqāf before 1894 should not mislead us to draw a conclusion that in fact the number of such awqāf decreased over time. There were

⁹¹ Kozlowski paints a vivid picture of the period that led to the passing of the Mussalman Wakf Validating Act 1913 in chapter 6 of his book. Kozlowski, *Muslim Endowments* (n 5) 156-91.

only three private awqāf established before the 1857 uprising: two pure private awqāf established in 1838 (Bombay) and in 1846 (Bengal) respectively, and one substantially private waqf was established in 1855 (Punjab). Nine private awqāf were created in the thirty-seven years between 1857 and 1894: six pure private and three substantially private. In contrast, six private awqāf were created during the nineteen years between 1894 and 1913.

Table 7

Dates of the creation of Private awqāf 1857-1894

Before 1857	3
Between 1857 and 1894	9
Total	12

This shows that the number of private awqāf increased disproportionately after the Privy Council declared them illegal. This trend is consistent with Kozłowski's data set that includes significantly higher number of awqāf in the decade between 1891-1900. The number of awqāf established in this decade is twelve while the second highest number of awqāf in any decade is six, during 1871-1880. The forty awqāf deeds in Kozłowski's data set were established within the ninety years between 1820 and 1910. A disproportionately large number of awqāf were established in the last two decades between 1890 and 1910.⁹²

How do we explain this increase between 1894 and 1913, which is particularly intriguing because during this period private awqāf remained illegal? It might be that after the Privy Council decision, more private awqāf were challenged in the courts.

⁹² Kozłowski describes the foundation dates of the forty waqf deeds in his data set by decade as follows: 1820-1830: 3; 1831-1840: 2; 1841-1850: 3; 1851-1860: 3; 1861-1870: 2; 1871-1880: 6; 1881-1890: 5; 1891-1900: 12; 1901-1910: 4. Ibid 41-42.

But we are not looking into the dates of the filing of the cases, rather our focus is on the date when a particular waqf was created. An analysis of the waqf deeds established during this period might help us understand the reasons for their creation. Indeed, we find multiple reasons for the establishment of private awqāf during this period. The settlors in these cases knew the implications of the Privy Council decision. Nevertheless, they desired to use family waqf in order to transfer their properties to circumvent inheritance law. These cases are analysed below.

One family waqf was established in North West Province in 1909. This waqf reveals an ingenious device to circumvent the effect of the Privy Council decision. The settlor wanted to create a family waqf in favour of his two wives, one daughter, one niece, and one cousin's son. He did not have any son, and two of his uncles were amongst his legal heirs under Islamic inheritance law. He appears to have had full knowledge of the Privy Council decision against family endowments. Therefore, he ensured substantial dedication of property for charitable purposes in his waqf deed. But his main purpose for making the waqf was to benefit his specified relatives. However, these two conflicting objectives could not be availed of simultaneously. Therefore, he first executed leases of his property on nominal rents in favour of his specified family members. Then these properties were included in the waqf property. He stated his purpose in the waqf deed as follows:

It is now my intention to make a 'wakf' of my property specified below for charitable expenses, in order to gain benefit in the next world and to seek the grace of the Almighty God and simply for His sake so that I may get eternal benefit thereby. At the same time I also want to provide for my heirs and relations who have rights (*i.e.*, claims) on me morally and also under the Muhammadan Law. I have, therefore, prior to the execution of this document,

executed lease in favour of my heirs and the relations at a favourable rate, and I shall get it registered along with this document.⁹³

His deed then described the various charitable objects, the procedure for the appointment of a *mutawallī* after his death, description of property, and the share of the beneficiaries. This waqf shows that the Privy Council decision did not stop the ingenuity of lawyers in getting around the legal prohibition of making waqf in favour of one's family members. The draftsman of the waqf deed in this case seemed to have a good knowledge of the history of English land law, where leases and tenures were used to circumvent the rule against perpetuities.⁹⁴ However, the general practice of conveyancing regarding awqāf did not develop to a great extent in British India. This led judges in one case to remark that waqf deeds were generally prepared by men of 'small intelligence'. Therefore, their terms were often confused.⁹⁵

Two family awqāf were established in Bihar in 1897 and 1907. They followed an earlier waqf established in 1882 whereby the settlor created a waqf in favour of a mosque and *imāmbārā* which were established by her husband. She herself was the *mutawallī* of this waqf with a hefty salary. Under the supplementary deed of waqf dated December 1897, she included her remaining lands in the waqf and cancelled her salary. It appears that this change was prompted by the Privy Council decision in 1894. Despite relinquishing her salary, evidence filed with the court showed that she

⁹³ *Kunwar Muhammad Abdul Jalil Khan v Khan Bahadur Muhammad Obaid Ullah Khan* (Allahabad) [1929] UKPC 61, Deed of waqf executed by Abdul Latif Khan dated 16 April 1909, *LI*, vol 41, shelf mark 149 g.

⁹⁴ JC Gray, *The Rule Against Perpetuities* (3rd edn, Little, Brown, and Company 1915) 109-161; GL Haskins, 'Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule against Perpetuities' (1977) 126 *University of Pennsylvania Law Review* 19.

⁹⁵ *(Mirza) Yaqub Beg v Mirza Rasul Beg* AIR 1923 Oudh 254, 259.

used income from the waqf to perform a pilgrimage to Makkah and for other purposes not related to the objects of the waqf. The deed of 1907 only provided for the appointment of a new *mutawallī* because the persons who were to replace her as *mutawallī* after her death had died. Their Lordships at the Privy Council rightly noted that the waqf deeds did not provide for charity. Rather the actual purpose of these deeds was to pass the settlor's property to the relatives of her husband as hereditary *mutawallīs*. In the absence of these deeds the property might have gone to her legal heirs.⁹⁶ This was a typical family waqf to circumvent inheritance law.

The fourth family waqf was established in 1907 in the Punjab by a father in order to protect family property from a son who had a bad character. The settlor had a clear intention to protect the property from his son after his death. The waqf deed was drafted in such a way to show as if substantial dedication was made to charitable purposes. However, in essence it was a pure private waqf. This waqf seems to be a desperate act by an old man, concerned about the well being of his relatives, who were dependent on him, after his death. He died the same year in which he created the waqf.⁹⁷

The fifth family waqf was established in Bengal in 1908. It appeared to be a substantially private waqf since its primary beneficiaries were the family members of the settlor. Two awqāf dated 1876 and 1880 had existed in the family prior to the making of this waqf. The third waqf was created for the 'purposes and as part of the

⁹⁶ *Abadi Begum v Bibi Kaniz Zainab* (Patna) [1926] UKPC 92, 54 IA 33.

⁹⁷ *Balla Mal v Ata Ullah Khan* (Lahore) [1927] UKPC 61.

wakf⁹⁸ created in 1880. The third waqf, though it was contrary to the decision of the Privy Council, appeared to be in keeping with the family tradition of dedicating property for the benefit of near relatives. The settlor who established this waqf did not have a son, and so used the waqf deed for the property to pass onto his specified relatives after his death.⁹⁸

The sixth family waqf was established by a sixty-seven year old man in Oudh in 1911. He appointed his two nephews as the *mutawallī* and deputy *mutawallī* of the waqf after his death.⁹⁹ He did not have any children and did not want his properties to pass on to his two younger brothers with whom he was not on good terms. Although the *mutawallīs* did not draw a handsome salary out of the income of the waqf (Rupees 354 per annum out of the total income of Rupees 2,130), they had a large discretion to spend on charitable purposes of the waqf.¹⁰⁰ The waqf deed in this case shows that the settlor was conscious about the Privy Council decision and made sure that his waqf did not fall under the prohibition.

The above discussion shows that the developments in case law were closely followed by Indian Muslims. They were then responding to legal developments by adopting new techniques in order to protect their interests in property under the new legal and political system. These cases also provide us a hint about various reasons which motivated settlors to establish awqāf. They were simply trying to provide a

⁹⁸ *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm* (Bengal) [1947] UKPC 84, AIR 1948 PC 76.

⁹⁹ *Mirza Fida Rasul v Mirza Yaqub Beg* (Oudh) [1925] UKPC 89, AIR 1925 PC 101.

¹⁰⁰ *(Mirza) Yaqub Beg v Mirza Rasul Beg* AIR 1923 Oudh 254, 258-59.

mechanism for the management of their properties after their death. Some were concerned about their dependents. Others did not want the distribution of their properties in accordance with inheritance law. The following section discusses the diverse motives for the making of various types of awqāf.

6. Motives for the Creation of Awqāf

The founders in almost all types of awqāf invoked God and stated seeking of His pleasures and rewards in the hereafter as the primary motive for converting their properties into awqāf. There is hardly any waqf deed which might be described as secular, though the courts tried to distinguish between the religious and secular objectives of a particular waqf in several cases. In most testamentary waqf deeds the settlor mentioned the temporary nature of human life and desired to perpetuate his or her name by dedicating property for charitable and religious purposes. For instance, the waqf deed of Mehdi Begam stated that one's name could continue either through charitable deeds or obedient male issue. Since she did not have any issue, therefore she established a waqf in order to perpetuate her name.¹⁰¹ Another motive that appears several times in the family awqāf deeds is the maintenance of family prestige and dignity.¹⁰² In one waqf deed, the continuity of the name and memory of the settlors and the 'pomp and dignity of the estate' are mentioned as the primary reason for the execution of the deed. It is also mentioned that attaining of this object was 'impossible except by a wakf'.¹⁰³ The founder feared that his estate would be

¹⁰¹ *Mirza Sajjad Husain v Nawab Wazir Ali Khan* (Oudh) [1912] UKPC 41.

¹⁰² *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153; *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry* (Bengal) [1894] UKPC 64, 22 IA 76.

¹⁰³ *Maulvi Saiyid Muhammad Munawwar Ali v Razia Bibi* (Allahabad) [1905] UKPC 16.

disintegrated during his lifetime or after his death. This to him would be detrimental to the prestige of his family. Thus, safeguard against spendthrift legal heirs provided another motive for the creation of awqāf.¹⁰⁴ One testamentary waqf deed described the attainment of blessings in the hereafter and avoidance of any disputes regarding property as its main objective.¹⁰⁵ In these waqf deeds, the founder did not regard religious and family motives as mutually exclusive. In fact he/she assumed that he/she was performing a religious and pious act even when the whole or substantial portion of the property was reserved for the family members, and the benefit for the religious and charitable purposes was conditional upon the extinction of the family.¹⁰⁶

The consideration for the maintenance of the prestige of family caused a blurring in the distinction between private and public interests in awqāf. There are only a few examples of pure private awqāf, and even in such cases the ultimate beneficiaries were nevertheless mosques or the poor or other charitable objects. Setting up of a waqf for the benefit of the community was also symbolic for higher social status of the settlor and his family.¹⁰⁷ From a practical perspective, however, it was the flexibility provided by the family waqf that attracted the attention of wealthy classes, especially the landowning elites and businessmen.

¹⁰⁴ In one case, the son was a man of bad character and the father decided to convert his property into a waqf. *Balla Mal v Ata Ullah Khan* (Lahore) [1927] UKPC 61. In another case, one mother created a waqf because her son was a spendthrift. *Doe Dem Jaun Beebee v Abdollah Barber* [1838] Fulton 344, 1 SCR 848.

¹⁰⁵ *Baker Ali v Anjuman Ara* (Oudh) [1903] UKPC 13, 30 IA 94.

¹⁰⁶ *Mujib-un-Nisa v Abdul Rahim* (Allahabad) [1900] UKPC 65, 23 ILR All 233.

¹⁰⁷ Kozlowski, *Muslim Endowments* (n 5) 51.

Family waqf provided a mechanism by which the family estate was converted into a corporate entity with perpetual succession. In several waqf deeds the settlor provided for the increase in waqf property by requiring that a certain portion of the income of a waqf should be further invested in real estate.¹⁰⁸ The management of this family waqf corporation was mostly vested in the male legal heirs who shared managerial power amongst themselves. The eldest son was often given preference. Female relations such as daughters, mothers and wives did not play an active role in the management of a waqf, but received a maintenance allowance.¹⁰⁹ Awqāf could also be depicted as ‘little kingdoms’ and the settlor as a ‘little king’. This was true regarding large endowments, wherein private and public interests were intermixed though the management still remained within the family of the settlor.¹¹⁰ We also find an instance of a Committee of family members, called *panchayat*, to supervise the operations of the waqf and to keep a check on the *mutawallī*.¹¹¹

A major threat to family estates came from the creditors of unscrupulous legal heirs. This threat of the transfer of property to creditors was exacerbated in cases of the fragmentation of property through distribution amongst legal heirs. As Islamic inheritance law provides for the division of a deceased’s property amongst multiple legal heirs whose share cannot be changed, this law in itself was considered a threat to

¹⁰⁸ *Mujib-un-Nisa v Abdul Rahim* (Allahabad) [1900] UKPC 65, 23 ILR All 233; *Sheik Mahomed Ahsanulla Chowdhry v Amarchand Kundu* (Bengal) [1889] UKPC 56, 17 IA 28.

¹⁰⁹ *Sheik Mahomed Ahsanulla Chowdhry v Amarchand Kundu* (Bengal) [1889] UKPC 56, 17 IA 28.

¹¹⁰ Kozlowski, *Muslim Endowments* (n 5) 47-48.

¹¹¹ *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153; *Nawab Khajeh Habibullah Saheb v Raja Janaki Nath Roy* (Bengal) [1929] UKPC 98; *The Honourable Nawab Habibula v The Commissioner of Income-tax, Bengal* (Bengal) [1942] UKPC 34.

the family estate. Thus daughters who were married to other families could take their share and decrease the estate of their families. Apart from daughters, the legal heirs sometimes included some individuals whom the settlor despised, or they were strangers to him/her, or the settlor wanted his or her property to go to some particular individuals instead of legal heirs. There are several cases in which the apparent motive for establishing the waqf is to make specific individuals the beneficiaries at the cost of legal heirs.

In *Beli Ram & Brothers* the settlor, a wealthy man, created a waqf in favour of himself and his children. Six years later however, he cancelled the waqf stating that the rationale of the waqf was to prevent his daughter from having a full share because her share should have gone to the family of her in laws. As she died unmarried, there was no need to operate the waqf, which was detrimental to his family.¹¹² In another case, a woman created a waqf in favour of a mosque appointing herself the *mutawallī* and after her death her maternal uncle. The mosque was vested with five-ninths of the income while four-ninth of the income was reserved for the maintenance of the *mutawallī*. The actual reason for making this waqf was that she was not on good terms with her husband and her agnatic relatives, who should have been her legal heirs after her death. Therefore, she converted her property into a waqf in order to deprive them of their share in inheritance.¹¹³ *Syed Ali Zamin v Syed Akbar Ali* offers another example of this phenomenon. The settlor who did not have children appointed his business partner, who helped him in bad times in his business, as the *mutawallī* after

¹¹² *Beli Ram & Brothers v Chaudri Mohammad Afzal* (Lahore) [1948] UKPC 35.

¹¹³ *Ruhulla alias Hakim Hamad v Hassanalli Degumia* (Bombay) [1928] UKPC 41.

his death. The settlor remained in full control of his properties during his lifetime. This was primarily a public waqf but the *mutawallī* drew a substantial salary of about Rupees 5,000 per annum. The validity of this waqf was contested by the younger brother of the settlor because the brother was entitled to inherit the property in the absence of the waqf.¹¹⁴ In another case of depriving the legal heirs of their share in inheritance, one lady kept on enjoying the benefits of waqf properties during her lifetime by drawing a hefty salary as a *mutawallī*. In order that the property should remain within the family of her husband, the husband and his heirs were appointed *mutawallī* after her death.¹¹⁵

The above were a few simple examples of circumventing Islamic inheritance law through the use of a waqf.¹¹⁶ In some cases, multiple transactions were entered into in order to benefit some legal heirs at the cost of others. In one case, a son sold his property to his mother three days before his death. A payment of Rupees 10,000 was made while Rupees 190,000 remained with the mother and she was instructed to create a waqf out of the outstanding amount. He was survived by two widows, the mother and a paternal uncle. The mother was the first *mutawallī* and the uncle with three others were to be the *mutawallī* after her death. The clear purpose of this

¹¹⁴ *Syed Ali Zamin v Syed Akbar Ali Khan* (Patna) [1937] UKPC 32, 64 IA 158.

¹¹⁵ *Abadi Begum v Bibi Kaniz Zainab* (Patna) [1926] UKPC 92, 54 IA 33.

¹¹⁶ Family waqf provided only one technique to circumvent Islamic inheritance law. Other techniques to achieve the same end included: fictitious gifts; transfer of property to a wife as dower-debt; *ismfurzee* (fictitious title); *benami* (property held in the name of a person other than the real owner). L Carroll, 'Life Interests and Inter-Generational Transfer of Property Avoiding the Law of Succession' (2001) 8 *Islamic Law and Society* 245; L Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17 *Modern Asian Studies* 629; L Carroll, 'The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia' (1985) 19 *Modern Asian Studies* 85; L Carroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry' (1991) 25 *Modern Asian Studies* 791.

transaction was to deprive the widows from their share in inheritance.¹¹⁷ More interesting is the case of a practising lawyer who wanted to protect his property for the use of his sons through a family waqf. Before his death he devised a scheme that worked like this. The property of the deceased was transferred to the mother in lieu of her dower debt.¹¹⁸ The daughters relinquished their right to inheritance and the whole property was made a family waqf, wherein both sons and daughters had their right to benefit. However, within two years of the establishment of waqf, the sons asked for their share in the waqf property. The daughters were excluded from their share when the property was eventually partitioned and the waqf was cancelled.¹¹⁹

However, not every family waqf operated to deprive the legal heirs. In one case the settlor had only one daughter and two wives. Five months before his death, he executed a waqf deed after consulting his legal heirs who also included his two uncles. His elder uncle, who would have a share after his (settlor's) death, did not want to get any share in the property. The uncle even refused to be appointed as the *mutawallī* of the waqf.¹²⁰

¹¹⁷ *Rai Bahadur Sahu Har Prasad v Shaikh Fazal Ahmad* (Allahabad) [1933] UKPC 5.

¹¹⁸ In the early nineteenth century, Harington noted the practice amongst Muslims of setting upon the wife a dower equal to the whole estate of the husband whereby legal heirs were deprived of inheritance because dower was regarded as a debt. He suggested that this might require modification of Muslim law. JH Harington, *An Elementary Analysis of the Laws and Regulations enacted by the Governor General in Council at Fort William in Bengal* (1 of 6 vols, The Honorable Company's Press 1805) 198.

¹¹⁹ *Mahabir Prasad v Syed Mustafa Husain* (Lucknow) [1937] UKPC 45.

¹²⁰ *Kunwar Muhammad Abdul Jalil Khan v Khan Bahadur Muhammad Obaid Ullah Khan* (Allahabad) [1929] UKPC 61. Deed of waqf executed by Abdul Latif Khan dated 16 April 1909, *LI*, vol 41, shelf mark 149 g.

The family waqf has been criticised for circumventing Islamic inheritance law since the early days of Islamic law.¹²¹ Proponents of family waqf, on the other hand, support it for filling a lacuna in Islamic inheritance law. It is argued that the family waqf plays an important role for the protection of women and orphans. The children of predeceased sons and the children of females are excluded under the Ḥanafī law of inheritance. Under the family waqf, however, they could be given equal share. Faiz Tyabji described this as truly charitable.¹²² The family waqf was attacked before the Indian Courts for its conflict with Islamic inheritance law. As early as 1867, their Lordships at the Privy Council did not find any illegality in the family waqf on the ground that it was used to change the inheritance law:

The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unforbidden design... On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from... a desire to maintain the dignity of the eldest branch of the family; neither can the policy of the law be invoked... the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a father by an act *inter vivos* to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.¹²³

As is shown in the next chapter, when the Privy Council declared the family waqf invalid in 1894, it was on the basis of its non-conformity with the Islamic law of gifts rather than Islamic inheritance law.

¹²¹ See for details Hennigan (n 2) xvii-xx.

¹²² Tyabji (n 28) 534. Similar argument was used by the Attorney General Sir Charles Paul while defending the family waqf in *Abul Fata* at the Calcutta High Court. *Abul Fata Mahomed Ishak v Rasamaya Dhur Chowdhuri* [1891] ILR 18 Cal 399. For details see chapter 2.

¹²³ *Nawab Umjad Ally Khan v Mohumdee Begum* (Oudh) [1867] UKPC 41, 11 MIA 517.

7. Legal Complications regarding Awqāf

There was no requirement for the registration of waqf in British India. However, a gift of immovable property was required to be registered.¹²⁴ The *Fiqh* texts provide that the *qāḍī* perform the function of registration and supervision of awqāf. His powers in cases of public awqāf were wider in comparison with the private awqāf.¹²⁵ There is evidence that the *qāḍī* in Mughal India used to perform this function.¹²⁶ However, the office of the *qāḍī* was abolished by the British in 1864. This lack of administrative supervision of private awqāf might have been one of the reasons for a sudden rise in their number between 1850 and 1900 in addition to other factors. Islamic law required the close supervision of awqāf by the *qāḍī* and did not allow longer than three years lease of waqf properties. In the later *Fiqh* texts we find references to long term leases,¹²⁷ but the British Indian Courts allowed permanent leases of waqf

¹²⁴ The Indian Registration Act 1908 required the registration of *waqfnama* (waqf deed) by which immovable property of the value of Rupees 100 and upwards was to be dedicated. Section 17 (b) of the Act required the registration of ‘other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property’. M Hidayatullah and A Hidaytullah, *Mulla's Principles of Mahomedan Law* (18th edn first published in 1906, N. M. Tripathi 1985) 203-04. The Indian Registration Act 1866 had earlier required the registration of deeds relating to the transfer of interests in land under section 17. H Beverley, *The Registration Manual, Comprising the Indian Registration Act, 1866, and Act No. XXVII of 1868* (W. Newman & Co 1869) 10-11.

¹²⁵ Al-Māwardī (n 32) 124-25.

¹²⁶ The waqf deed executed in 1832 is described as affixed with the seal of a *qāḍī* and the memorandum of registry in the office of a *qāḍī* was written on the back. *Doe Dem Jaun Beebee v Abdollah Barber* [1838] Fulton 344, 1 SCR 848.

¹²⁷ For instance *hukr*, which is a contract for the lease of land for building or cultivation. It is similar to the Ottoman practice of *ijāratayn*. Literally *ijāratayn* means two rents. This class of waqf developed around 1590 A.D as a result of the damage or destruction of a waqf building, which could not be repaired due to the lack of funds. The primary purpose of this arrangement was to utilize the damaged or destroyed waqf properties by lending them to the tenants who were willing to pay an upfront amount with the condition to occupy the property for their lives. Later on the right to usufruct of this property was extended to the children of the first occupier. However, the transfer was not automatic. It required the approval of the waqf administration as well as the government. Succession, sale and mortgage duties were imposed on such waqf properties. Ibn ‘Ābidīn, *Radd al-muhtār ‘alā al-Durr al-mukhtār sharḥ Tanwīr al-abṣār* (‘Ādil Aḥmad ‘Abd al-Mawjūd and ‘Alī Muḥammad Mu‘awwaḍ eds, 6 of 14 vols, Dār al-Kutub al-‘Ilmiyya 2003) 592; CR Tyser, F Ongley and M Izzet, *The Laws Relating to*

properties.¹²⁸ Thus the mere possibility of public benefit in case of private waqf was further restricted.¹²⁹ This provided an incentive to the owners of property to convert their assets into awqāf. They could enjoy the benefits of their property during their lifetime as owners and transfer it to their heirs without being restricted by the rules of Islamic inheritance law that limited testamentary powers. In addition the waqf operated as a shield against any claims of creditors.

Although in theory the waqf was irrevocable, as there was no strict state supervision for the family waqf, the settlor could revoke it. This was especially true when there was internal strife amongst family members. *Beli Ram & Brothers v Chaudri Mohammad Afzal* provides one example where the father cancelled the waqf deed stating that he created the waqf because some family friends who were in fact enemies in disguise created misunderstandings amongst his children and he had created the waqf despite knowing that it was not in the best interests of his children.¹³⁰ An interesting example of the cancellation of a waqf deed is provided by one settlor who is described as licentious and spendthrift in the court proceedings. This man had two wives and was also in an illicit relationship with two other women. He created a

Immoveable Property made Waqf (Government Printing Office, Nicosia 1904) 15-22 and 68; JR Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (Brill 1986) 54-55.

¹²⁸ *Nilratan Mandal v Ismail Khan Mahomed* (Bengal) [1904] UKPC 48; The Privy Council validated an *istimrari mokatari* (permanent) lease by presuming the permission of the *qādi* in *Syed Mahammed Mazaffar-Al-Musavi v Bibi Jabeda Khatun* (Bengal) [1930] UKPC 1.

¹²⁹ Evidence from other parts of the Muslim world shows that many family waqf properties, especially real estate, found their way to the ultimate charitable purposes. In Algiers, Waqf al-Ḥaramayn and the Great Mosque accumulated large properties in this way. Hoexter, 'Ḥuqūq Allāh and Ḥuqūq Al-‘Ibād as Reflected in the Waqf Institution' (1995) 19 *Jerusalem Studies in Arabic and Islam* 133, 138. This was despite the fact that perpetual leases were allowed in Algiers. M Hoexter, 'Adaptation to Changing Circumstances: Perpetual Leases and Exchange Transactions in Waqf Property in Ottoman Algiers' (1997) 4 *Islamic Law and Society* 319.

¹³⁰ *Beli Ram & Brothers v Chaudri Mohammad Afzal* (Lahore) [1948] UKPC 35.

waqf in 1915 in apprehension of being sued by his wives for their dower debt, a hefty sum of Rupees 251,000. However, this issue was settled with his wives and the danger of litigation for dower debt was averted. Both of them died within a few years and he married another woman. In his deed of cancellation he asserted that the waqf was merely a paper transaction executed in order to save his property and in the wake of different circumstances if the waqf was allowed to operate, he ‘apprehended that there would be harm in future.’¹³¹

One attempt of the cancellation of a waqf by the settlor was judicially tested by the Privy Council and was held valid. In this case from Eastern Africa, the settlor had created a family waqf by appointing himself as the first *mutawallī*. However, after a while he proceeded to get his waqf cancelled on the plea that the waqf was void *ab initio* as it created a private family waqf in perpetuity in favour of his daughters and their descendants. The defendants (his daughters) argued that the waqf was legal according to Muhammadan law and custom existing among Muslims in Mambasa, India, Zanzibar and elsewhere. The custom was endorsed by the Register of waqf deeds kept by the Waqf Commissioners, which established that a waqf to beneficiaries and their children from generation to generation and finally to a mosque was a common type of waqf. However, the Privy Council found itself bound by the rule laid down in the Indian case of *Abul Fata* and declared the waqf invalid.¹³²

¹³¹ *Zafrul Hasan v Farid-Ud-Din* (Allahabad) [1944] UKPC 19, AIR 1946 PC 177, vol 19, *LI*, shelf mark 106 b.

¹³² *Fatuma Binti Mohammed Bin Salim Bakhshuwem v Mohammed Bin Salim Bakhshuwem* (Eastern Africa) [1951] UKPC 27.

As Islamic law did not require the waqf to be in writing, an irrevocable waqf could be created orally. Moreover, once created the waqf was to last forever. This gave rise to multiple legal complications. The paradigm case in this regard is *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand*.¹³³ There were three waqf deeds in dispute, created in 1876, 1880 and 1908. The first two awqāf were created by a father who left a son and a daughter at his death while the third waqf was created by the son. Soon after the death of the brother, the sister filed for a declaration that these awqāf were invalid. She succeeded and the properties were divided amongst the legal heirs in 1912. Three years later, one of the sons of the legal heirs along with four members of the community filed for a declaration that the awqāf were valid. Their claim failed. However, in 1921 the nephew of the settlor of the 1908 waqf, upon attaining the age of majority, sued for the validity of three awqāf. The trial judge decided in his favour by declaring the decree of 1912 as collusive and fraudulent. This decision was made six years after the filing of the suit. Meanwhile the property was gifted and sold. The *bona fide* purchaser created a charge upon the property. The battle for possession of this property was fought between the *mutawallī* of the waqf and the holder of title from the *bona fide* purchaser. The Privy Council found that adverse possession was established against the waqf in favour of the *bona fide* purchaser.

A further legal complication was added by the rule that the subsequent conduct of the settlor did not invalidate the waqf. In a number of cases, the settlor executed the waqf deed but did not act upon the provisions of the deed. The courts felt

¹³³ (Bengal) [1947] UKPC 84, AIR 1948 PC 76.

themselves bound to apply this rule even though it caused so many legal problems, especially with respect to the rights of *bona fide* purchasers for consideration and creditors.¹³⁴

Apart from the cases of fraudulent awqaf, there were also cases of fraudulent litigation. This category of cases involved one of the beneficiaries who claimed property to be a waqf property, after it was attached by the creditors of the *mutawallī*. Usually the plaintiff in these cases was one of the female beneficiaries. In one case, the defendant tried to misuse a grant for *khānqāh* to defraud his creditors first by transferring the properties to his wife and then putting forward his sister saying that she was entitled to maintenance as a charge on the properties. However, the claim was rejected by regarding the grant as personal and not a valid waqf.¹³⁵ *Mahabir Prasad v Syed Mustafa* is the classic example of this type of case. Some facts of this case are mentioned above.¹³⁶ When the waqf property was attached for the debts of two sons, their sisters, who were deprived of their share in inheritance, filed objections to the execution of the sale of the alleged waqf properties. Their claim met with partial success at the trial court while the High Court held that the whole property left by the settlor was waqf. However, the claim was dismissed by the Privy Council with costs.¹³⁷

¹³⁴ *Kunwar Muhammad Abdul Jalil Khan v Khan Bahadur Muhammad Obaid Ullah Khan* (Allahabad) [1929] UKPC 61.

¹³⁵ *Bibee Kuneez Fatima v Bibee Saheba Jan* [1867] 8 WR 313.

¹³⁶ See text accompanying (n 119).

¹³⁷ *Mahabir Prasad v Syed Mustafa Husain* (Lucknow) [1937] UKPC 45.

The above were some of the main problems relating to private awqāf. The public awqāf posed problems which were peculiar to them. The major problem was about their regulation. Since religious institutions were organised as awqāf, state officials could not administer them without touching on religious sensitivities. Some awqāf were charitable for the provision of education and other public services. Therefore, attempts were made to distinguish religious awqāf from secular ones. However, a secular/religious distinction was as difficult to draw as it was to draw a distinction between public/private awqāf. In many cases, judges had to decide who had the right to the management of a particular waqf, as most cases involved a dispute regarding succession to the office of *mutawallī* and *sajjādanashīn*. But more complicated were the issues relating to the faith of the parties. In one case, the Privy Council had to decide whether by raising hands during prayers (*rafa'a yadayn*) and saying *āmīn* loudly during prayers, the *imām* of a mosque forfeited his right to be a *mutawallī*.¹³⁸ Judges had to decide which of the Muslim community or sect had a better right to worship in a mosque.¹³⁹ Even more sensitive were the issues when a claim to a certain waqf involved various religious communities. Such issues often led to communal violence and rioting. The famous case of Shaheed Ganj mosque in Lahore incited communal disturbances between Muslims and Sikhs in 1935-36.¹⁴⁰

¹³⁸ *Fazl Karim v Maula Baksh* (Bengal) [1891] UKPC 13, ILR 18 Cal, PC 448.

¹³⁹ On a question whether Randheria community should have the exclusive charge and management of the mosque see *Mahomed Ismail Ariff v Hajee Ahmed Moola Dawood* (Lower Burma) [1916] UKPC 40, 18 BLR 611.

¹⁴⁰ *The Mosque known as Masjid Shahid Ganj v Shiromani Gurdwara Parbandhak Committee, Amritsar* (Lahore) [1940] UKPC 21. For details see K Mahmood, Iqbal and Provincial Politics of Punjab (1926-1938) (PhD Thesis, Quaid-i-Azam University 2005) 135-56; M Khurshid and MA Malik, 'Shahidganj Mosque Issue and the Muslims Response: 1935-1936' 12 Pakistan Vision 125.

8. Legal Issues regarding Awqāf under the English Legal System

The practice of waqf law under the English legal system posed four major legal problems that judges had to grapple with. First, the waqf was perpetual. The waqf property was not alienable by any means—gift, sale, inheritance, attachment, confiscation or otherwise. The property was to be used for the specified purposes perpetually and according to the scheme provided by the founder. Thus the property was permanently withheld from market circulation. Even when it could change hands, as the waqf property could be given on a permanent lease, it was perpetually encumbered with the objects provided by the founder. This perpetuity of the waqf was described as ‘the worst and most pernicious kind’.¹⁴¹

Second, the waqf did not fit into English legal understanding of the public/private divide, although it could be divided into public and private categories according to who were the first beneficiaries. If the first beneficiaries were the family members of the founder, it could be termed as a private/family waqf. However, the ultimate beneficiaries of this type of waqf are the poor of the society, or any other specified public purpose. As a matter of public policy perpetual reservation of property could only be permitted for objectives which benefit society as a whole. This was the principle upon which charitable trusts were tolerated under English law. However, this aspect of the waqf was abused to the detriment of creditors. The waqf was also used for tax avoidance. Therefore, the Islamic law of waqf was to be

¹⁴¹ *Abdul Ganne Kasam v Hussen Miya* [1873] 10 BHC 7; *Fatima Bibi v The Adv. Gen.* [1882] ILR 6 Bom 42. In a strange twist, US law allowed perpetuities in trust in the late twentieth century, as a result of lobbying by interest groups that included wealthy people, local lawyers, banks and other financial institutions who saw the marketing potential of offering trusts that would be perpetually tax exempt. LW Waggoner, 'US Perpetual Trusts' (2011) 127 LQR 423.

rationalised along with the whole legal system in India for effective governance of resources and society.

Third, the waqf could not be categorised into religious/secular types. There were numerous problems relating to the administration of public awqāf of shrines, tombs and other religious places and the consecration of property for prayers for the souls of the dead. The Privy Council invoked the doctrine of public policy in order to invalidate Chinese endowments for non-charitable purposes, while charity was defined under English law.¹⁴² However, if applied in India this could have adverse political consequences, as both Hindus and Muslims had a large number of religious endowments. These endowments were vested with huge landed property and it was not possible for the government to leave them uncontrolled. But their control by the officers of the state had the risk of not only interfering with the religion of the native Indians but also with the religious sensitivities of the officers who found it inappropriate to manage non-Christian religious institutions, which was seen as idolatry.

Fourth, given that the classical Islamic waqf law was developed during the third and fifth A.H. (ninth and eleventh A.D) centuries, it was archaic. Therefore, certain aspects of this law were either not suited to modern circumstances or the law did not provide any solution to modern problems. In other words, waqf law was outdated. This problem was exacerbated given the religious and orthodox nature of

¹⁴² *Yeap Cheah v Ong Cheng* (Penang) [1875] UKPC 64.

Islamic law, which made it difficult to adopt changes with the passage of time and change of circumstances.¹⁴³

It appears that none of the above issues was unique because trust under English law posed similar legal challenges. English trust law had to deal with such issues as the nature of trust property; the balancing of conflicting interests of settlor, beneficiary and trustee; management of trust property without inhibiting efficient use of limited resources; and the charitable and religious application of the notion of trust. Therefore, it was not unusual for the judges of Anglo-Indian courts to refer to English legal principles and case law while addressing issues arising out of disputes relating to awqāf. However, the biggest challenge for judges was to deal with these problems under the principles of Islamic law. The waqf fell within the domain of personal law which was regulated under Islamic law.

The rest of the thesis is built around these issues. Building on this first chapter, the second chapter deals with the issue of family awqāf by analysing the case law that eventually led to the decision of the Privy Council to invalidate the private awqāf in 1894. The third chapter addresses the issue of the management of awqāf by the State, especially the management of public awqāf. It analyses statutes that were promulgated in order to provide effective State governance of religious and charitable trusts including awqāf. The fourth chapter deals with the issue of the accommodation of change under Islamic law by exploring the historical legal process by which shares and securities were accepted as a valid subject matter of waqf. The final chapter

¹⁴³ For a modern description of this problem see JA Schoenblum, 'The Role of Legal Doctrine in the Decline of the Islamic *Waqf*: A Comparison with the Trust' (1999) 32 *Vanderbilt Journal of Transnational Law* 1191.

highlights the main findings of this study, offering a number of conclusions to the issues raised.

Chapter 2

Family Waqf under English Legal System

No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is.¹ Holmes

1. Introduction

As a matter of policy, law could not allow the use of waqf to defraud creditors. Classical Islamic law took into account this aspect of waqf law and disallowed the creation of a waqf by an insolvent person in order to protect creditors. Abū Sa‘ūd, the famous Ḥanafī jurist and Shaykh ul-Islām of the Ottoman Empire was of the opinion that if a heavily indebted person wishes to create a waqf with the aim of defrauding his creditors, a *qāḍī* is empowered to refuse recognition of his waqf and compel him to sell his property to pay his debts.² However, once a property is made waqf, ownership no longer resides with the founder. Therefore, a waqf property could neither be claimed by the creditors of the founder or beneficiaries or trustees, nor by subsequent purchasers for consideration. However, a waqf could be created in favour of a founder and his family members. Thus any solvent person could validly delay the payment of his debts by creating a waqf of his assets and providing that his debts should be paid out of the profits of the property. Section 3 of the Mussalman Wakf Validating Act 1913 specifically allowed payment of debts as a valid object of a

¹ OW Holmes, 'Book Notices' (1880) 1 The American Law Review 233, 234.

² Ibn ‘Ābidīn, *Radd al-muḥtār ‘alā al-Durr al-mukhtār sharḥ Tanwīr al-abṣār* (‘Ādil Aḥmad ‘Abd al-Mawjūd and ‘Alī Muḥammad Mu‘awwaḍ eds, 6 of 14 vols, Dār al-Kutub al-‘Ilmiyya 2003) 603.

waqf.³ In this way the substance of the property could be made inalienable perpetually while its profits were used for the purposes of the waqf.

Further, there was also a gap in theory and practice of waqf law. Theoretically, the founder ceased to be the owner of waqf property but he continued to enjoy all beneficial and control rights. In this way, founders could avoid all incidents of liabilities arising out of the waqf property on the premise that the waqf was a charity. The only right lost by them after making the property waqf was the right to alienate by sale, gift or inheritance, while the property was permanently saved from attachment by the personal creditors of founders, trustees or beneficiaries. The fact that the waqf property could be given on a permanent lease meant that even this restriction on the right of alienation became nominal because permanent lease in essence meant the sale of waqf property.⁴

Because of these inconsistencies in the law and practice of waqf in India, it did not take long for judges to question the validity of the institution of waqf. First, they conceptualised waqf as a form of gift or a stratagem or device to avoid strict Islamic inheritance law.⁵ Secondly, they started to look behind the façade of the ownership by

³ In one case, the settlor provided for the payment of his debts out of the waqf property. However, at his death no debts were due and the Privy Council did not lay down any rule on this point. *Musammāt Ali Begam v Badr-ul-Islam Ali Khan* (Lahore) [1938] UKPC 22.

⁴ *Dalrymple v Khoondkar Azeezul Islam* [1858] 14 SDA 586. A permanent tenure of waqf properties was held valid in *Nilratan Mandal v Ismail Khan Mahomed* (Bengal) [1904] UKPC 48. *Istimrārī* (continuous) lease was presumed to exist with the permission of a *qāḍī* in case of an ancient waqf in *Syed Mahammed Mazaffar-Al-Musavi v Bibi Jabeda Khatun* (Bengal) [1930] UKPC 1. It is worth noting that a *fatwā* of Dārul ‘ulūm Deoband dated 1928 declared permanent leases as absolutely invalid. Muftī ‘Aziz ul Rahmān Uthmānī, *Fatāwā Dār ul ‘Ulūm Deoband* (vol 13, Dār ul-ishā’at 2009) 137.

⁵ *Ranee Khujooronissa v Mussamut Roushun Jehan* (Bengal) [1876] UKPC 28.

God of waqf property. Although courts were prepared to accept the doctrine of ownership by God for public especially religious awqāf,⁶ they doubted if the same was the case regarding family/private awqāf.⁷

A large number of cases reached the courts where creditors claimed property, which was alleged to be a waqf property by either a *mutawallī* or a beneficiary. In explicit fraud cases, there was no legal controversy and courts did not hesitate to invalidate a waqf that was established to protect property from creditors.⁸ Under section 53 of the Transfer of Property Act 1882, a waqf deed was voidable at the option of the persons so defrauded or delayed. However, in one case it was held that it bound the settlor and his legal heirs even if it was intended to defraud creditors.⁹ Some controversy revolved round the rights of a *bona fide* purchaser for consideration without notice of the nature of waqf property. It was decided by the Privy Council much later in 1947 that a title by adverse possession could be established by a *bona fide* purchaser against waqf property, but a trustee could not make such a claim.¹⁰ However, any person acquiring waqf property with the notice of charity charged upon

⁶ *Muhammad Rustam Ali v Mushtaq Hussain* (North-West Frontier Province Allahabad) [1920] UKPC 58, 47 IA 224; *Narain Das v Kazi Abdur Rahim* [1920] 58 IC 705.

⁷ *Muhammad Qamar v Salamat Ali* [1933] 55 All 512, 517-8; (*Sahu*) *Manohari Saran v (Sahu) Shambhu Nath* AIR 1933 All 622, 147 IC 916. In a post Independence case, the Indian Supreme Court observed that even in a family waqf the property is vested in God, not in the *mutawallī* (manager) or beneficiary. *Mohammad Ismail v Sabir Ali* AIR 1962 SC 1722.

⁸ A commission agent tried to create a waqf to shield his liabilities that might arise as a result of his risky business. The waqf was held invalid. *Maharaja Sir Mohammad Khan v Musammat Bismillah Begam* (Lucknow) [1930] UKPC 76. In another case, the mortgagor after receiving a notice of payment from the mortgagee created a private waqf. The waqf was declared invalid. *Mohammad Ismail v Hanuman Parshad* (Lahore) [1938] UKPC 63.

⁹ *Zafrul Hasan v Farid-Ud-Din* (Allahabad) [1944] UKPC 19, AIR 1946 PC 177.

¹⁰ *Hafiz Mohammed Fateh v Sir Swarup Chand Hukum Chand a firm* (Bengal) [1947] UKPC 84, AIR 1948 PC 76.

it was bound by it, even though the *mutawallī* purported to have sold it for his private debts.¹¹

One of the most important developments in waqf law under the English legal system was the declaration of invalidity of family awqāf by the Privy Council in 1894. This was the most controversial judicial decision to come from the application of Islamic law by the British courts. It had far reaching legal and political repercussions. This decision offers an example of judicial rationalisation of an important branch of Islamic law. The interesting aspect of this decision was that the Privy Council reached its conclusion on the basis of Islamic law despite the fact that the legitimacy of family awqāf was not questioned in classical *Fiqh* texts and that awqāf had existed unchallenged for centuries throughout the Muslim world.

Their Lordships at the Privy Council deliberated upon this issue for about half a decade and did not issue a conclusive and authoritative judgment until the issue was exhaustively argued before various Indian High Courts. A combined effect of the judgments of the Privy Council in *Ahsanullah* (1889) and *Abul Fata* (1894) was that in order to constitute a valid waqf ‘a substantial dedication of the property to charitable use at some period of time or other’ should be made and the waqf must not be for the aggrandisement of family so as to make the property inalienable.

Judges of British Indian courts and the Privy Council had been dealing with awqāf, sometimes described as endowments, appropriations, dedications, settlements

¹¹ *Muhammad Esuf v Moulvi Abdul Sathur* [1918] ILR 42 Mad 161; FB Tyabji, *Muhammadan Law* (3rd edn, N. M. Tripathi 1940) 566.

or trusts, since the late eighteenth century. The earliest case decided by the Privy Council regarding a family waqf was reported in 1840.¹² But it was in 1894 that family awqāf were declared invalid. Why did it take the courts more than a century to comprehend the actual nature of such awqāf? What had been happening in judicial circles during that time? An historical legal analysis of the process that eventually led to the decision in *Abul Fata* will provide insights into the interaction of Islamic law and English law, which resulted in the formation of a new legal system called Anglo-Muhammadan law.

Various explanations could be given for the Privy Council decision in *Abul Fata*. One commonly held explanation is that the British judges failed to understand Islamic law as the nature and operation of Islamic legal doctrines were lost in translation. This explanation is strengthened by the fact that none of the Councillors at the Privy Council at the time of this decision was well versed in Islamic law. Therefore, the Councillors misinterpreted Islamic law by invalidating the family waqf which was valid under *Fiqh*. It is true that there are certain decisions of Indian High Courts where judges failed to understand Islamic law but so far as the judgment of the Privy Council in *Abul Fata* is concerned, this explanation is not sufficient because it fails to take into account the historical context of the judgment. The judgment did not come until the issue was exhaustively discussed in the Indian High Courts and the leading proponent of family awqāf, Justice Ameer Ali, had exhaustively forwarded his arguments based on classical *Fiqh* texts in his detailed judgments and two treatises. A second aspect of this explanation is that it assumes that the Privy Council

¹² *Jewun Doss Sahoo v Shah Kubeer-ood-Deen* (Bengal) [1840] UKPC 20, 2 MIA 390.

initiated this controversy in the first place in its decision in *Ahsanullah*. However, as will be seen later, this was not the case. The controversy had originated in a decision of the Bombay High Court in 1873.

A second explanation considers the rigidity of the English legal system, which operated under the doctrine of precedent, as the primary cause of the Privy Council decision in *Abul Fata*. Once a few wrong decisions were taken by the judges of the Bombay and Calcutta High Courts, the later judges found themselves bound by such decisions. The argument of ‘the course of judicial decisions’ establishing the invalidity of family waqf in the Indian High Courts, especially in the famous *Bikani Miya* case, lends support to this explanation. However, the Privy Council, being the highest court of appeal, was not bound by the decisions of the Indian High Courts. It took into account such decisions and also quoted some of them as authorities, but nothing in the two judgments in *Ahsanullah* and *Abul Fata* lent any support to this explanation.

A third explanation takes into account the lacuna in Islamic law which was abused by Muslim elites to protect their interests by ring fencing their estates using the device of family awqāf. Islamic law did provide mechanisms to limit the abuse of family awqāf for defrauding creditors or avoidance of tax payments, but these mechanisms were not sufficient. Therefore, English courts could not enforce private awqāf because they were against public policy in favour of creditors protection. Such awqāf also removed land from market circulation and posed the problem of ‘perpetuity of worst description’. The Chinese family trust (*tong*) was declared invalid

on exactly the same grounds by the Privy Council in 1875.¹³ Family settlements under Hindu law were also disallowed in 1872 in the famous *Tagore* case.¹⁴ While public policy might have been one of the underlying considerations behind the Privy Council decision in *Abul Fata*, it was not explicitly stated in any of its judgments, or in the judgments of the Indian High Courts.

Linked to the third, is the fourth explanation, which provides that Islamic law on the waqf required modernisation. It might have suited medieval times, when its principles were formulated, but in the late nineteenth century it could not fulfil the requirements of the time, especially with respect to creditors' protection. Wilson had suggested that it might have been the case that at one period of time waqf law was similar to the English Statute *De Donis conditionalibus* 1285, which allowed perpetuities in land.¹⁵ But in a society where commerce played an important role, family awqāf could hardly survive. This might have been one of the underlying considerations for the various court decisions which led to the invalidation of family awqāf but again it was not manifestly stated.

This study finds that the primary reason behind the string of cases, which eventually led to the decision in *Abul Fata*, was policy consideration based on creditors' protection and market circulation of property. The majority of judges who

¹³ *Yeap Cheah v Ong Cheng* (Penang) [1875] UKPC 64.

¹⁴ *Juttendromohun Tagore v Ganendromohun Tagore* (Bengal) [1872] UKPC 61, 9 Beng LR 377. A commentator of Hindu Law writing in the late nineteenth century contrasted the attitude of the Privy Council which was changing the Hindu Law in favour of creditors while the Indian Legislature was passing many statutes to protect people from moneylenders. G Sarkar, *Hindu Law* (B. Banerjee & Co 1897) 141.

¹⁵ Wilson, *A Digest of Anglo-Muhammadan Law* (1st edn W. Thacker & Co 1895) 283.

decided these cases knew that Islamic law allowed the creation of awqāf in favour of family members generation after generation. They were also aware of the safeguards against the misuse of such awqāf under Islamic law. However, they found these safeguards deficient.¹⁶

With the benefit of hindsight, it can be argued that the Privy Council could have adopted a moderate approach by regarding the waqf in favour of family members as a charge over the property, or by regarding the waqf as a family settlement. Thus Islamic law of waqf could have been ‘modernised’ by the transplantation of English legal principles. However, as is shown below, this solution was not adopted. As a result of intense public reaction against the Privy Council decision of invalidating family awqāf, the Mussalman Wakf Validating Act was passed in 1913. This Act reversed the Privy Court decision. But the courts gave this Act a very strict interpretation in order to discourage family awqāf.

2. Invalidation of Family Awqāf

This section critically evaluates the case law on family awqāf. It first looks into the cases decided by the *Sadr Diwani Adalat*, the highest court of appeal in the province of Bengal for disputes involving natives. This court initially accepted the family waqf

¹⁶ Mitra Sharafi tells a similar story regarding religious trusts of the Parsi community in chapter 3 of her thesis. MJ Sharafi, *Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887--1925* (PhD Thesis, Princeton University 2006) 112-72. This story was also repeated in Ceylon where Roman-Dutch law regulated property. However, British judges applied the rule against perpetuities because of its ‘great economical importance’, though the Roman-Dutch institution *fideicommissum* allowed the creation of perpetual interests. See *de Saram v Kadjar* [1944] 44 NLR 265, for details see LJM Cooray, *The Reception in Ceylon of the English Trust* (Lake House Printers and Publishers Ltd 1971) 24-25, 88. (This work is based on a PhD thesis completed at Cambridge University in 1971). Family awqāf faced the similar treatment in Singapore. Y Nurfadzilah, ‘Courting Jurisdictions: Colonial Administration of Islamic law Pertaining to Arabs in the British Straits Settlements and the Netherlands East Indies, 1860--1941’ (PhD Thesis, Princeton University 1912).

as valid under Islamic law. But in its later decisions, this view was changed because in some cases the judges found that trustees and beneficiaries treated the family waqf as personal property. These views were synthesised in subsequent cases where waqf property was regarded as a personal estate subject to certain trusts. Following this, the origins of the legal controversy regarding family awqāf are traced in the Indian High Court decisions. It is found that the judges, and not the parties involved, challenged the validity of family awqāf for the first time. But once the issue was raised in reported judgments, various Indian High Courts gave conflicting decisions on the validity of family awqāf. The Privy Council held a family waqf invalid in the *Ahsanullah* case, because there was no substantial dedication of the property to charitable purposes. This judgment was followed by some judges, but Justice Ameer Ali criticised it in his judgments. However, he failed to convince his fellow judges in the full bench decision of the Calcutta High Court in *Bikani Miya*. The Privy Council finally declared family awqāf invalid in *Abul Fata*.

2.1 Family Awqāf and the English Legal System

Judges trained in the English legal tradition found family awqāf tainted with perpetuity of the ‘worst and most pernicious type’. Such perpetuity could be tolerated if the institution benefited the society at large under the close supervision of courts, as was the case with charitable trusts under English law. However, given the prevalence of family awqāf in India, judges refrained from invalidating them for a considerable period of time. The colonial government had promised the application of native laws regarding personal and religious affairs under which such endowments fell. The English legal system treated a legal dispute as a contest between the parties where the

role of the court was only to apply the correct law.¹⁷ As the validity of such awqāf was not contested in Islamic legal texts despite ubiquitous difference of juristic opinions in these texts, the parties did not question their validity. This was despite the fact that a large number of waqf cases actually involved the question about their validity. But none of the parties challenged the family waqf for its non-conformity with the provisions of Islamic law.

The *Sadr Diwani Adalat* of Bengal was the highest court of appeal in Bengal until 1860 for disputes involving natives. It had dual advantages over the High Courts and the Privy Council. Firstly, its judges were assisted by Muslim law officers, *mawlawīs*, who were consulted on legal issues regarding Islamic law, though their legal opinions had only a persuasive authority, and the final decision resided with the judges. Secondly, more than a third of its practicing lawyers were Muslims who might be presumed to have a better understanding of Islamic law.¹⁸ The judges of the *Sadr Diwani Adalat* decided twenty-five cases on awqāf between 1798 and 1858. Only seven cases dealt with the issue of private awqāf. One case was related to a pure family waqf in which the waqf was created by a woman. She appointed herself a *mutawallī*, empowered to distribute the profits of waqf property at her discretion onto her grandchildren and a mosque. This waqf was similar to the Ottoman waqf in favour of a mosque with the primary objective of securing the property from spendthrift heirs. In the court proceedings, her son was described as living an extravagant life,

¹⁷ S Landsman, 'Brief Survey on the Development of the Adversary System' (1983) 44 Ohio State Law Journal 713.

¹⁸ BS Cohn, 'From Indian Status to British Contract' (1961) 21 The Journal of Economic History 613, 628.

and he had done nothing to increase the ancestral estate. The court validated the waqf by relying upon the legal opinion of a Muslim law officer who issued a *fatwā* in favour of such endowments.¹⁹ However, the opposite view was taken in two subsequent cases, where the judges refused to enforce the waqf when the waqf property was treated as private property by the beneficiaries, despite a suggestion by the law officer that such property was inalienable under Muhammadan law.²⁰ These opposite views were synthesised in four cases in which the waqf property was treated as a personal estate ‘subject to certain trusts’.²¹

Thus we find three approaches towards family awqāf in these decisions. First, they were held valid because Islamic legal texts acknowledged them as valid. This approach may be called ‘legalistic’, since it applied Islamic law strictly. Second, they were held invalid because the *mutawallī* and beneficiaries treated the waqf property as their personal estate. This may be named as ‘realistic’, since it took into account real practice and ignored the legal theory of waqf. Third, the waqf property was held to be a personal estate ‘subject to certain trusts’ in favour of religious and charitable objects. This approach may be named as ‘synthetic’, because it was a synthesis of the two extreme approaches. As is seen later, these three approaches kept on appearing in the later decisions of various Indian High Courts and the Privy Council. It may be noticed that these three sets of cases followed each other in a descending order. Had

¹⁹ *Doe Dem Jaun Beebee v Abdollah Barber* [1838] Fulton 344, 1 SCR 848.

²⁰ *Ram Kishoon Das v Nusseeroodeen Mahomed* [1849] 5 SDA 65; *Haeje Nooroollah v Meer Waris Hossein* [1853] 9 SDA 411.

²¹ *Khodabundha Khan v Oomutul Fatima* [1857] SDA 235; *Dalrymple v Khoondkar Azeezul Islam* [1858] 14 SDA 586; *Mahomed Munnoo Chowdree v Hajra Beebee* [1858] 14 SDA 1218; *Khaja Surwar Hossein v Khaja Syed Hossein Khan* [1858] 14 SDA 1028.

the doctrine of *stare decisis* been strictly applied, the first case validating the family waqf might have become a binding precedent. However, by this time the Indian courts had not started to apply the doctrine of precedent.²²

Outside judicial circles, the concern of English administrators and judges regarding family awqāf was apparent in the last quarter of the nineteenth century. A leading Muslim reformer of the nineteenth century, Syed Ahmed Khan, who also served as a district judge, noticed the adverse impact of the English legal system on landed Muslim elites whose estates fell victim to not only Islamic inheritance law but also to newly developed property law which allowed the transfer of land to creditors in cases of default of payment. He observed the fundamental change in property law regime which previously exempted land from the application of Islamic inheritance law, and foresaw that if the new legal system was allowed to operate unhindered the large estates of prominent Muslim families would be ruined by fragmentation and unscrupulous youth, being caught in the hands of clever moneylenders.²³ Therefore, in 1879 when he was a member of the Imperial Legislative Council, he proposed in a Bill that family awqāf be used to protect Muslim landed families from ruin. He was assisted by his Cambridge educated, barrister son, Syed Mahmood, in the drafting of the Bill.²⁴ His proposal was in accordance with the injunctions of Islamic law because

²² This supports Jim Evans' thesis that under English law, the strict doctrine of precedent was the product of the nineteenth century, caused by changes in legal theory purported by Bentham and Austin, judicial hierarchy and a growing requirement for certainty in law. J Evans, 'Change in the Doctrine of Precedent During the Nineteenth Century' in L Goldstein (ed) *Precedent in Law* (Clarendon Press 1987) 35-72.

²³ Rashid, *Wakf Administration in India: A Socio-Legal Study* (Vikas Publishing House 1978) 129-30.

²⁴ AM Guenther, 'Syed Mahmood and the Transformation of Muslim Law in British India' (PhD Thesis, McGill University 2004) 78-79, 174.

there was no doubt about the validity of family awqāf in classical Islamic legal texts.²⁵ He presented an elaborate scheme on the creation and operation of family awqāf in order to protect the Muslim landed elites ‘so that the prestige and individuality of the community could be maintained’.²⁶ However, he had to withdraw this proposal after receiving advice from his friends at the Legislative Council that the proposal would not be accepted by the government because it proposed perpetuity. He was advised that the Bill could be passed had it provided some limitation of time for the settlement. This however was not permissible under Islamic law, and consequently he withdrew his Bill.²⁷

2.2 Family Awqāf, Perpetuities and Ambiguous Legal Translations

The family waqf was in such a stark contrast to the English law of property that the judges while dealing with disputes involving such awqāf could not ignore it. In one case decided in 1869, Markby J observed that it would be invalid to make the property absolutely inalienable because of ‘a vague and merely nominal appropriation to charitable purposes’. After noting that every Muslim was in the habit of spending some money on religious and charitable purposes, he held: ‘It would be dangerous to assume a proposition of law which would enable every Mahomedan owner of

²⁵ In the early days of Islam some jurists expressed their reservations about the family waqf because it was in conflict with the provisions of Islamic inheritance law. However, it remained a minority view and the majority of Muslim jurists accepted the family waqf as legitimate. Most important amongst the critics of family waqf was Qādī Shurayḥ, a prominent judge who based his opinion on the saying of the Prophet that there could be no waqf in conflict with the laws of inheritance. However, the authenticity of this saying was questioned by other scholars and jurists. W Al-Zuhaylī, *Al-Fiqh al-islāmī wa adillatuhu* (10 of 11 vols, Dār al-Fikr 2004) 7600.

²⁶ *Tahzīb ul-akhlāq*, Shawāl 1296 AH, November 1879, 45. Rashid (n 23) 129-30.

²⁷ AH Hali, *Hayāt e Jāwayd* (Qawmī Council barāy Firūgh e Urdū Zubān 1979) 227-29; AH Hali, *Hayat-I-Javed* (K. H. Qadri & David J. Matthews tr first published 1979, Idara-i Adabiyāt-i Delli 2009) 181.

property to render it inalienable by the merely nominal ceremony of appropriation.²⁸ However, the parties in this case did not contest the waqf on this point, though this was one of the two points on which the subordinate judge had invalidated the waqf.²⁹ Therefore, this observation was merely an *obiter dictum*.

The first reported case in which the validity of family waqf was expressly disputed was published in the Bombay High Court Reports in 1873 as *Abdul Ganne Kasam v Hussen Miya*.³⁰ In this case, one mother and her three sons established a waqf of their dwelling home in favour of their family and children. The mother was appointed the trustee, and afterwards the eldest family member, male or female, was to be the trustee. The legal dispute before the court arose amongst the children of the sons. As the case involved the ‘perpetuity of worst description’, Bayley J considered it appropriate that the cause must be heard by two judges. Melvill J wrote the judgment. He noted that the disputed family settlement in this case was invalid under English law:

It creates the perpetuity of worst description, for it prevents the alienation of the house for ever, and necessitates its use in a manner which the natural increase in the number of descendants would probably render impossible, even if they should be willing (which could hardly be expected) to live amicably under one roof throughout all generations. The absurdity of the settlement was sufficiently shown by the circumstances that, even during the lifetime of the executing parties, family quarrels arose which rendered it impossible for them to continue to live together.³¹

²⁸ *Khajah Hossein Ali v Shahzadee Hazara Begum* [1869] 12 WR 344, 347.

²⁹ *Ibid.*

³⁰ [1873] 10 BHC 7.

³¹ *Ibid.* 10.

It was noted that while perpetuities could not be created under Hindu law as was clarified by section 101 of the Indian Succession Act 1855, the Legislature had refused to interfere with Muhammadan law. The learned judge suggested that the general principle against perpetuities should be applicable to Muslims as well, because perpetuities were against public policy. He observed the conflict of opinions amongst Ḥanafī jurists regarding the rules of waqf law and concluded that ‘to constitute a valid wakf, there must be a dedication of the property *solely* to the worship of God, or to religious and charitable purposes.’³²

In this case, it is interesting to note that the validity of the endowment on account of its being in favour of children of the settlor was questioned by the court and not by the parties. Despite questioning the legal nature of the family endowment in general, the court, however, did not issue any authoritative dictum on its validity. Still this judgment was followed as an authority to this effect by the Calcutta High Court in *Mahomd Hamidulla Khan v Lotful Huq*³³ and *Fatima Bibee v Ariff Ismailjee Bham*.³⁴

The only question before the court in the *Mahomd Hamidulla Khan* case was whether the fourth share of the property, appropriated under the deed in favour of the founder’s daughter, was a valid waqf under Muhammadan law and thus incapable of attachment and sale in execution of a decree against the daughter. The Subordinate

³² Ibid 13 (emphasis added).

³³ [1881] ILR 6 Cal 744, 8 CLR 164.

³⁴ [1881] 9 CLR 66.

Judge relied upon Baillie's *Digest of Mahomedan Law* in order to reach an erroneous conclusion that

if a person makes a settlement of his land in favour of his descendants to the third generation, the poor are absolutely excluded from all benefits in the appropriation and that consequently the property becomes absolutely vested in the descendants of the appropriator.³⁵

Morris J described it as a misinterpretation of Muhammadan law and noted that the actual meaning of the passage in Baillie's translation was that only so long as the descendants survive shall the poor be excluded from the benefit of the appropriation. He also noticed a conflict of authority between Baillie on the one hand and Macnaghten and Hamilton on the other.³⁶ He regarded the *Hidāya* as the principal authority and quoted Hamilton's translation *Hedaya*, vol 2, p.334 in which Abū Ḥanīfa requires that the waqf must be for some "charitable" purpose.³⁷ Morris J rebutted the argument that various exponents of Muhammadan law regarded the settlement of property upon a man and his descendants as legitimate by arguing that in order to constitute such a settlement the term *ṣadqa* (charity) should be used. Further, he argued that the saying of the Prophet that 'A man giving subsistence to himself is giving alms' holds good according to Hamilton's note in the translation of *Hedaya*,

³⁵ [1881] ILR 6 Cal 744, 8 CLR 164.

³⁶ Macnaghten described waqf as an endowment to 'the service of God' but he did not assert that an endowment could not be established in favour of children. Rather his treatise clearly envisaged a waqf in favour of unborn children. WH Macnaghten, *Principles and Precedents of Moohummudan Law* (3rd edn first published in 1825, J. Higginbotham 1864) 69.

³⁷ It was a misreading of the text. After translating the waqf as appropriation, Hamilton inserted a footnote: 'Meaning always of a pious or charitable nature'. In his Preliminary Discourse of the *Hedaya* he translated the heading waqf as: 'Of (pious or charitable) Appropriations.' C Hamilton, *The Hedaya, or Guide; A Commentary on the Mussulman Laws* (1 of 4 vols, T. Bensley 1791) lxxiii.

where a man ‘appropriates *the whole* of his property and becomes entitled to charity as *any other pauper*’.³⁸

On the other hand, in *Fatima Bibee v Ariff Ismailjee Bham*, Wilson J did not enter into any detailed analysis of legal authorities, and held that the waqf under consideration was simply a family settlement without any charitable objects and hence was invalid.³⁹

Tottenham J who was one of the judges in the *Mahomd Hamidulla Khan* case reviewed his decision the next year in another case. He noted that the Subordinate Judge who was a ‘Mahomedan gentleman of considerable attainments in Arabic learning’ held that a waqf for one’s self and for one’s children is valid, and there was no necessity to quote any authority on the subject. This was in conflict with the Bombay High Court decision in the *Abdul Ganne* and its adoption in the *Mahomd Hamidulla Khan* by the Calcutta High Court. He distinguished the case before him as it was not solely for the benefit of the settlor’s family. The objects of the waqf were distinctly religious and also involved charity to the poor. Thus the conflict between the opinion of the learned Muhammadan judge and judicial authorities was reconciled.⁴⁰

³⁸ [1881] ILR 6 Cal 744, 8 CLR 164 (italics original).

³⁹ [1881] 9 CLR 66. In an earlier case, the judge had shown his scepticism about the validity of the family waqf because it involved perpetuity. *Phate Saheb Bibi v Damodar Premji* [1879] ILR 3 Bom 84, 88.

⁴⁰ *Luchmiput Singh v Amir Alum* [1883] ILR 9 Cal 176.

The Bombay High Court considered the issue of the validity of a family waqf in *Fatma Bibi v The Advocate General of Bombay*.⁴¹ The waqf in this case was established by a fourteen-year old girl who was the sole beneficiary for life, and thereafter the profits of the waqf were to go to her descendants at her discretion. In case there should be no descendant the poor were the ultimate beneficiaries. The property was handed over to the *mutawallī* and the deed was registered. She got married but her husband and a child did not survive. This made her change her mind fifteen years following the establishment of the waqf. She filed a suit to get her waqf cancelled because the trust in favour of charity was void for remoteness. These facts of the case distinguished it from the bulk of cases filed in the British Indian Courts where the plaintiff was either the *mutawallī*, or a beneficiary, or creditor of the *mutawallī* or one of the beneficiaries. West J considered the issue of perpetuity in this case and noted that Muslims regard a waqf as a charity, therefore the objection on the basis of perpetuity failed according to the principles of English law.⁴² On the authority of Baillie's translation of the *Fatāwā al-Ālamgīriyya*, he held:

If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of the English law; but, according to Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated.⁴³

⁴¹ [1881] ILR 6 Bom 42.

⁴² Ibid 51.

⁴³ Ibid 53.

In his *Tagore Law Lectures 1884*, Ameer Ali clarified that the Bombay High Court decision in *Abdul Ganne* was based on the English doctrine against perpetuities. This doctrine was not accepted under Muhammadan law, indeed it was utterly contrary to the principles of the law of waqf. He furnished translations from various classical legal authorities to bolster his point.⁴⁴ However, he did not refer to the above decision in *Fatma Bibi v The Advocate General of Bombay*.⁴⁵

By 1887 there was a clear conflict of authorities on the issue of family waqf. Farran J in *Amrutlal Kalidas* framed the question that he was required to determine: ‘whether the wide interpretation of Baillie to grants in wakf or the more limited interpretation of Hamilton and Macnaghten was to be given effect?’ He noted that Baillie’s views were adopted in *Fatma Bibi v The Advocate General of Bombay* though they appeared to have been dissented from in *Abdul Ganne v Hussien Miya*.⁴⁶ He pointed out that though the *Abdul Ganne* case was erroneously assumed as an authority against the family waqf, in fact the reasoning of the case showed that it was decided in its favour.⁴⁷ He followed the dictum laid down by West J in the *Fatma Bibi* case and decided in favour of the family waqf. Despite validating the family waqf in this case, he observed that the waqf in favour of family members could only be valid if the general purpose of the waqf was religious and charitable. ‘In the light of modern jurisprudence’ he found that

⁴⁴ SA Ali, *Tagore Law Lectures—1884 The Law relating to Gifts, Trusts, and Testamentary Dispositions among the Mahommedans* (Thacker, Spink & Co 1885) 187-191.

⁴⁵ [1881] ILR 6 Bom 42.

⁴⁶ *Amrutlal Kalidas v Shaik Hussain* [1887] ILR 11 Bom 492, 503.

⁴⁷ *Ibid* 499.

where the wakfnama has for its real object nothing connected with the worship of God or religious observances, and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist.⁴⁸

Up to this stage, the British Indian Courts questioned the family waqf on the basis of perpetuities. In this case, Farran J tried to find a middle way by not disallowing private interests in awqāf but at the same time by not allowing perpetuities. However, it was clear that this anomalous view could hardly last longer.

Baillie's translation clearly provided that Muhammadan law allowed such settlement in favour of oneself and one's family. However, a footnote in Hamilton's *Hedaya* described the waqf as 'charitable and religious'. This led the judges to form an opinion that in order to be valid a waqf must be charitable and a 'perpetuity of worst description' could only be tolerated if the primary or substantial purpose of the waqf was charitable in the English sense. In his translation, Baillie clarified that Hamilton unnecessarily restricted the legal meaning of waqf to 'pious and charitable nature' and the same was followed by Sir William Macnaghten. He suggested that the term was more comprehensive and included 'settlements on a person's self and children'.⁴⁹

⁴⁸ Ibid.

⁴⁹ NBE Baillie, *A Digest of Moohummudan Law* (2nd edn, Smith, Elder, & Co 1875) 557.

In 1888, the Bombay High Court followed *Fatma Bibi*⁵⁰ and *Amrutlal* in *Nizamudin Gulam v Abdul Gafur*, but only to invalidate a family waqf, which did not make an express provision for its ultimate devolution to a charitable or religious object.⁵¹ Parson J after analysing the extant judicial authorities on this point refused to accept the opinion of Abū Yūsuf that in case of a waqf which does not lay down the ultimate perpetual purpose after the extinction of family regards the poor as beneficiaries.⁵² Although this case was decided by two judges, this could hardly be regarded to have overruled the dicta in *Fatma Bibi* and *Amrutlal* as it invalidated the family waqf on a different ground viz failure to provide an ultimate devolution to charity and did not rule on the point of perpetuities.

Indeed, there was a difference of opinion amongst Muslim jurists regarding ultimate devolution of waqf property. Ḥanafī jurists Abū Ḥanīfa and Muḥammad al-Shaybānī were of the opinion that the waqf which does not provide for a perpetual purpose is invalid because such waqf cannot fulfil the condition of perpetuity (*ghayr munqāʿa*). Abū Yūsuf, however, does not regard this as a mandatory condition and a waqf is for the poor after the extinction of its original object. Abū Yūsuf's argument is that such a condition is implied in the waqf as the intention of the founder is to benefit the poor though they might not have specifically stipulated it.⁵³

⁵⁰ The *Fatma Bibi* case was followed by the Calcutta High Court in two unreported judgments: *Ayesha Bibi v Golam Ryder Khan* (on settlement of issues), 19th November 1883, and *Phudia Bibi v Mohammed Kazem Isphahanee* (31st March 1884). *Bikani Mia v Shuklal Parsad* ILR 20 Cal 116, 166.

⁵¹ [1888] ILR 13 Bom 264.

⁵² This decision was endorsed by the Privy Council on appeal in *Abdul Gafur v Nizamudin* (Bombay) [1892] UKPC 35, 19 IA 170. See below for details.

⁵³ Al-Shaykh Niẓām, *Fatāwā al-ʿĀlamgīriyya* (2 of 4 vols, Nawal Kishawr 1865) 960; Aḥmad ibn ʿUmar al-Khaṣṣāf, *Kitāb Aḥkām al-awqāf* (Maktabat al-Thaqāfat al-Dīniyya 1904) 32. According to the

This difference of opinion had led West J, who later decided the *Fatma Bibi*, to raise the following question in an earlier decision:

Whether a waqf could, indeed, be created for the purpose merely of conferring a perpetual and inalienable estate on a particular family, without any ultimate express limitation to the use of the poor or some other inexhaustible class of beneficiaries, appears to be a question of some nicety, as to one element, at least, of which the Mahomedan doctors have differed...⁵⁴

In this case, the suit was dismissed on the technical ground that only a *mutawallī* could file a suit on behalf of a waqf. The claimants in this case after losing against one purchaser of the alleged waqf land, brought another suit against the purchaser of the other part of the property in *Nizamudin Gulam v Abdul Gafur*.⁵⁵ Parson J answered the above question in the negative. An appeal against his decision was filed before the Privy Council on the ground that the claimants were followers of the Shāfi'ī school which allows such type of waqf. Their suit was dismissed.⁵⁶ However, before this case was decided in 1892, the Privy Council had thrown doubts about the validity of family awqāf in the *Ahsanullah* case decided in 1889. In another case decided in 1888 by the Madras High Court, ultimate application to charity with certainty was regarded as the essential condition of a valid waqf.⁵⁷

Ḥanafīs, a waqf can have three dimensions: solely for the poor; initially for the rich and then for the poor; and for the poor and rich equally such as public places like mosques, graveyards, inns etc. Ibn 'Ābidīn (n 2) 603.

⁵⁴ *Phate Saheb Bibi v Damodar Premji* [1879] ILR 3 Bom 84, 88.

⁵⁵ [1888] ILR 13 Bom 264.

⁵⁶ *Abdul Gafur v Nizamudin* (Bombay) [1892] UKPC 35, 19 IA 170.

⁵⁷ *Pathukutti v Avathalakutti* [1888] ILR 13 Mad 66.

2.3 Privy Council on Family Awqāf

Before deciding the famous *Ahsanullah* case, the Privy Council had dealt with four cases on awqāf, in three of which private interests were involved. In *Nawab Umjad Ally Khan v Mohumdee Begum*, the waqf was described as a ‘family religious and charitable fund’. The dispute concerned the appointment of a co-*mutawallī*. The Privy Council endorsed the waqf as a legitimate device to circumvent Islamic inheritance law.⁵⁸ In the second case, *Prince Suleman Kadr v Darab Ali Khan*, Lord Hobhouse was one of the Committee members who validated a waqf in favour of servants of the Queen of Oudh.⁵⁹ In the third case also Lord Hobhouse was a member of the Committee. The Committee validated the waqf in which private and public interests were mixed and it refused to attach the private interest of the *mutawallī*.⁶⁰ Both Sir Barnes Peacock and Sir Richard Couch were members of the Committee in the last two cases. They were also members of the Committee in *Ahsanullah*. Sir Richard Couch was also the member in *Abul Fata*. Lord Watson was a member of the Committee in both *Ahsanullah* and *Abul Fata*. Thus the Councillors before whom the question of the validity of family waqf was raised had prior knowledge about the family waqf and the legal controversies surrounding it. The same was true in regard to the attorneys who appeared before the Privy Council. James H. A. Branson opposed the family waqf as an attorney in *Ahsanullah* while appearing on behalf of the

⁵⁸ (Oudh) [1867] UKPC 41, 11 MIA 517.

⁵⁹ In this case the question was raised that whether the gift of government promissory notes, subject to a condition that the donee was to have the interest only for life and that after her death there was a trust in perpetuity for all her heirs, in its legal effect a gift to her absolutely and the condition was void. However, the facts of the case did not require an answer to this question. (Oudh) [1881] UKPC 21, 8 IA 117, 122.

⁶⁰ *Bishen Chand Basawut v Syed Nadir Hossein* (Bengal) [1887] UKPC 45, 15 IA 1.

Respondents. He advocated for the family waqf in *Abul Fata* while appearing on behalf of the Appellants.⁶¹

It is interesting to note that three months before the decision in the *Ahsanullah* case was made, Sir Barnes Peacock had regarded perpetuities invalid under Muhammadan law. He held:

It should be remarked, that although a settlement in the terms of the King's letter of 1842 creating pensions in perpetuity could not under the Mahomedan law be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers.⁶²

This case was ignored in subsequent judicial discourse as it was not cited in any of the later decisions or legal commentaries. One plausible reason for this omission might be that this case was regarded as a peculiar arrangement between two sovereign states. However, it could have important bearings on the subsequent legal debates on the validity of perpetuities under Muhammadan law.

2.3.1 First Blow: *Ahsanullah Chaudhry*

In 1889, the Privy Council in *Ahsanullah Chaudhry* declared a waqf that was for the 'self-aggrandisement of the family' invalid because the statements in the deed which indicated that the waqf was 'in the way of Allah' was a 'veil' that masked the real intention of the waqf deed.⁶³ The waqf in this case was not a family waqf rather it was

⁶¹ *Ahsanullah Chowdhry v Amarchand Kundu* [1889], LI, vol 340, shelf mark 127 f; *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry* [1894], LI, vol 382, shelf mark 128 c.

⁶² *Nawab Sultan Mariam Begam v Nawab Sahib Mirza* (Oudh) [1889] UKPC 30.

⁶³ *Ahsanullah Chowdhry v Amarchand Kundu* (Bengal) [1889] UKPC 56, 17 IA 28.

apparently a public waqf in favour of a mosque and *madrassa* (school). The settlor who was a wealthy landowner intended to create a waqf of all his property, movable and immovable, for religious and charitable uses. However, only a minimal amount was spent on charitable purposes and the surplus was to be enjoyed by the members of the family in perpetuity. The plaintiff was one of the sons of the settlor while the defendants included the plaintiff's brother and his judgment creditor. The plaintiff claimed to be the *mutawalli* of the waqf and his objection against execution proceedings were rejected by the trial court on the ground of the genuineness of the waqf. On appeal the Calcutta High Court held the waqf invalid as there was no *bona fide* intention to create a 'valid and entire waqf' though the deed created a charge on the properties for charitable purposes designated in the opening clause of the deed. Their Lordships in the Judicial Committee of the Privy Council agreed with the High Court and regarded the waqf 'as a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.'⁶⁴ After perusing the authorities on the validity of such waqf, their Lordships held:

... they have not been referred to, nor can they find, any authority showing that, according to Mohemadan law, a gift is good as a wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other...⁶⁵

This judgment laid down the test for the validity of a waqf under Muhammadan law. Firstly, there should be 'a substantial dedication of the property to charitable use at some period of time or other'. Secondly, the waqf must not be for the 'aggrandisement of family' so as to make the property inalienable. However, it was

⁶⁴ [1889] 17 IA 28, 39.

⁶⁵ Ibid 37.

not clear how the ‘charitable uses’ were to be determined, under English law or Muhammadan law? Secondly, the ‘period of time’ also remained undetermined. Did it mean one generation or two; or some specific time, for example, sixty years or eighty years? And if it varied from case to case, what was the criterion for the determination of such a time period? In the *Bikani Mia* case, the counsel for the respondent argued that the Privy Council in *Ahsanullah* meant ‘some fixed or certain or determinate period of time’. Justice Ameer Ali dismissed this interpretation because, according to him, it was impossible to specify the time when the descendants would die out and secondly, under Muhammadan law, a valid waqf could not be made that would take effect in future other than a testamentary waqf.⁶⁶

The first part of the test appeared to be the ‘Muhammadan law test’ as Lord Hobhouse, the author of the judgment in *Ahsanullah*, referred to the ‘absence of any authority’ under Muhammedan law for the validity of a settlement that did not involve ‘substantial dedication to charitable use’. The presumption in this assertion was that there was sufficient authority under Muhammadan law for ‘substantial dedication to charitable use’. However, the absence of any authority appeared to be a lame excuse as Baillie’s translation of the *Fatāwā al-‘Ālamgīriyya* specifically provided that a waqf in favour of children and family members was valid. For the second part of the test which prohibits inalienability of property for the ‘aggrandisement of family members’, Lord Hobhouse referred to no legal authority either from Muhammadan law or English law. Apparently, such an authority was absent under Muhammadan law. However, the prohibition of perpetuities under English law was well known.

⁶⁶ *Bikani Mia v Shuklal Parsad* ILR 20 Cal 116, 170. See below for details.

Thus this test was a newly formulated Anglo-Muhammadan law test, which was intended to fill the gap in Muhammadan law by incorporating a principle of English law, though without naming it as such.

Lord Hobhouse, however, refrained from making his ruling in *Ahsanullah* a binding principle of law. Doing so could have rendered all family awqāf in the British held colonies effectively invalid, as the Privy Council judgments set a precedent for the courts in the British controlled colonies. It was observed:

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid wakf, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable use which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.⁶⁷

Thus the decision in *Ahsanullah* on the family waqf appeared to be an *obiter dictum*. However, it was followed by the Allahabad High Court in *Murtazai Bibi v Jumna Bibi* in order to invalidate a testamentary waqf which was intended to 'perpetuate the dignity and honour of the family' by preserving the family estate (*riyasat*) generation after generation. In this case, the court noticed that though there was some incidental reference to certain religious duties, no express mention of any sort was made to charitable purposes.⁶⁸

⁶⁷ [1889] 17 IA 28, 36-37.

⁶⁸ [1890] 13 ILR (All) 261.

The next case, which later went to the Privy Council and in which the family waqf was finally declared invalid, was *Rasamaya Dhur v Abul Fata*, decided by the Calcutta High Court. The facts of this case deserve more attention. By a deed dated 21 December 1868, duly registered as *waqfnamah*, two brothers, Mahomed Abdur Rahman and Abdul Kadir, made a settlement of immovable property in favour of their children generation after generation and in their absence for the benefit of the poor, beggars, widows and orphans. The purpose of the waqf was the perpetuation of the names of their father and forefathers and the protection of property. The *mutawalli* was to be chosen from the male issues of the settlors and if they fail, from their relatives. The beneficiaries could not alienate their interests nor could their interests be attached and none of the beneficiaries could call for accounts.

The settlors appointed themselves as the *mutawallis*, empowered to deal with the waqf property and fix allowances of the beneficiaries. They had power to use the waqf properties as security and grant permanent and temporary *ijāra* (hire) settlements. After about six years, they seemed to have regretted their decision and in 1874, they entered into an *ijāra* arrangement. The documents of this arrangement were registered and the two brothers declared that by reason of their necessities they had revoked the waqf. The validity of family waqf was not disputed in the Calcutta High Court by this time. Therefore, the settlors acted according to the rules based on the Ḥanafī school which, under certain circumstances, allowed a settlor who becomes poor after the creation of a waqf to get his/her waqf cancelled by a *qāḍī*.⁶⁹ However, in the months of February and April of 1881, the Calcutta High Court in its two

⁶⁹ Al-Shaykh Niẓām, *Fatāwā al-‘Ālamgīriyya* (n 53) 1045. This was provided in the last chapter of the *Fatāwā al-‘Ālamgīriyya* which was not translated by Baillie.

decisions regarded family awqāf as invalid.⁷⁰ This provided a further justification to the settlors to get rid of their waqf. On 11 September 1881, the two brothers partitioned the waqf properties, and in the deed of partition, they stated that the waqf was invalid because the waqf did not contain the word *ṣadaqa* or charity and was not made according to the provisions of Muhammadan law. This was in accordance with the *dictum* in *Mahomd Hamidulla Khan v Lotful Huq*.⁷¹ Afterwards they treated the properties as their own. One brother, Abdur Rahman became heavily indebted and alienated several parcels of the property.

Abdur Rahman's son, Abul Fata on 16 March 1888, filed a suit on behalf of himself and his minor brothers as beneficiaries under the waqf to recover from the transferees the alienated properties and to remove their father from the post of *mutawallī*. This gave rise to a question of whether the disputed waqf deed was valid or invalid because of fraud or collusion. Second, whether the waqf was cancelled by the subsequent acts and conduct of the two *mutawallīs*. The Subordinate Judge held that the waqf deed was valid and irrevocable under Muhammadan law and the transfers, leases and mortgages etc executed by Abdur Rahman were invalid.

On appeal, the case was pleaded by the Attorney General, Sir Charles Paul in the High Court. He argued that the government pledged to apply Muhammadan law, and that modern ideas should not interfere with it as it was an unchangeable law, based on religious books. He contended that Muhammadan law favoured perpetuities

⁷⁰ *Mahomd Hamidulla Khan v Lotful Huq* [1881] ILR 6 Cal 744, 8 CLR 164 and *Fatima Bibee v Ariff Ismailjee Bham* [1881] 9 CLR 66.

⁷¹ [1881] ILR 6 Cal 744, 8 CLR 164.

and the English rule against perpetuities had never been applied to it. He admitted that though the waqf was a 'device', English law was also full of such devices. He pointed out that the family waqf was a legitimate device that fulfilled an important function of rectifying a lacuna in Islamic inheritance law by securing fatherless children a share in their grandfather's estate.⁷²

The judgment of the High Court proceeded on a valid assumption that if the deed created a valid waqf, no subsequent conduct of the founders could affect its validity unless from their conduct it could be inferred that they never intended to make a waqf. It was noted that the object of the waqf being perpetuation of the family name was secular rather than religious. After referring to the authorities (*Fatma Bibi and Amrutlal*), Ameer Ali's *Tagore Lectures 1884* and Baillie's translation of the *Fatāwā al-Ālamgīriyya* in favour of family waqf, Tottenham and Trevelyan JJ refused to accept them as valid. They rather relied upon the *Hidāya* and other cases against family waqf, especially *Ahsanullah*, and held:

We cannot believe that the authors of Mahomedan law intended that, under cover of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienations in respect of which they have received full consideration...⁷³

The judges in this case appeared to give a purposive construction to the texts of Muhammadan law. Although Baillie's translation of the *Fatāwā al-Ālamgīriyya*

⁷² Sunnī inheritance law does not accept the rule of representation in inheritance. Thus the orphan children do not get a share in their grandfather's estate. L Carroll, 'The Hanafī Law of Intestate Succession: A Simplified Approach' (1983) 17 *Modern Asian Studies* 629.

⁷³ *Abul Fata Mahomed Ishak v Rasamaya Dhur Chowdhuri* [1891] ILR 18 Cal 399, 413.

clearly allowed family waqf, Hamilton's translation of the *Hidāya* defined a waqf as 'religious and charitable appropriation'. Thus there was a space for judges to reconcile this conflict and interpret the classical legal texts according to the modern trends in jurisprudence, which effectively meant in accordance with the principles of English law.

As will be seen below, Lord Hobhouse, one of the Councillors at the Privy Council, who wrote the judgment when this case went to appeal, picked up this idea from this decision and gave an elaborate judgment rendering family awqāf invalid. The judges in this case attempted to rationalize Islamic law by providing an interpretation that was sound and reasonable. Whether this was a correct interpretation within the standards of Islamic law (*Fiqh*) was not their concern as long as it fulfilled the English law criterion of adjudication and was in accordance with the principles of English administration of justice.

Appeal from this case went to the Privy Council but before it was heard, the Privy Council in *Abdul Gafur v Nizamudin* relied upon the decision in *Ahsanullah* to invalidate a family waqf. Lord Watson held:

The so called wakfnama makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. The document professes to create a wakf, but, in reality, the legal heirs of Karimudin are the only objects of his bounty. The lands are destined to his wives and children, and to the descendants of the latter in perpetuity...⁷⁴

⁷⁴ [1892] 19 IA 170.

The rulings of the Privy Council on the family waqf in *Ahsanullah* and *Abdul Gafur* provided enough authority to hold invalid any waqf which failed to dedicate substantial property for religious and charitable purposes. However, the Muslim judges, Ameer Ali and Syed Mahmood, regarded this as an erroneous interpretation of waqf law. They referred to the classical legal authorities and identified the peculiar nature of Islamic law that was different from English law in order to support their claim. Kozlowski states that some Muslim judges such as Badr ud-din Tyabji and Karamat Hussain opposed family endowments.⁷⁵ He referred to the decisions of Badr ud-din Tyabji and Karamat Hussain. However, Badr ud-din Tyabji in *Abdul Cadar v Tajoodin*⁷⁶ invalidated a family settlement on the ground that there was no transfer of possession of property as required under the Indian Trust Act 1882 and not ‘because it benefitted the founder’s family’ as is asserted by Kozlowski.⁷⁷ In addition, Tyabji refused to treat the family settlement as a waqf because there was no public and private charity in it at all.⁷⁸ The second case decided by Tyabji was not related to a family waqf, but it was a case about a waqf in favour of several tombs and shrines (*dargāh*).⁷⁹ Kozlowski attributes to Tyabji the statement that the endowment in this case was a ‘thinly disguised attempt to preserve the family’s wealth’, though the endowment in fact ‘served to support the dead man’s kin’.⁸⁰ But a close reading of the fourteen-page judgment shows that Tyabji did not make such an observation.

⁷⁵ Kozlowski, *Muslim Endowments and Society in British India* (CUP 1985) 143-44.

⁷⁶ [1904] 6 BLR 263.

⁷⁷ Kozlowski (n 75) 143.

⁷⁸ [1904] 6 BLR 263, 267.

⁷⁹ *Zooleka Bibi v Syed Zynul Abedin* [1904] 6 BLR 1058.

⁸⁰ Kozlowski (n 75) 144.

Likewise, the purported decision of Karamat Hussain was also regarding a waqf in favour of a tomb. Kozlowski does not specify the name of the case which he attributes to Karamat Hussain and refers to Vesey-Fitzgerald's treatise. But the page referred to does not mention any decision by Karamat Hussain.⁸¹

2.3.2 High Courts Strike Back

Justice Ameer Ali, in *Meer Mahomed Israil Khan* held a family waqf valid by observing that the Privy Council in *Ahsanullah* refrained from laying down any general principle for the validity of family waqf. He argued that under the Muhammadan legal system, law and religion are almost synonymous and the words 'piety' and 'charity' have wider meanings under Muhammadan law and religion. Therefore, the words 'charitable' and 'religious' must be understood from a Muhammadan rather than an English law perspective. He asserted that there was no difference amongst Muhammadan jurists belonging to various schools about the validity of a waqf in favour of one's children and descendants. He pointed out that various courts repeatedly laid down that it was in accordance with 'justice, equity and good conscience' that Muhammadan law should be administered to Muhammadans. He highlighted the effect of a judicial declaration about the invalidity of the family waqf, which would abrogate an important branch of Muhammadan law. His fellow judge O'Kinealy J agreed with him.⁸² During the same year, John Edge, the Chief Justice of the Allahabad High Court, in *Deoki Prasad* refused to invalidate a waqf on

⁸¹ Ibid. S Vesey-Fitzgerald, *Muhammadan Law: An Abridgement* (OUP 1931) 209. It is true that in his comments on the Wakf Validating Bill, Karamat Hussain opposed it on the ground that the Bill did not represent the Hanafi law. However, he recognised that the Privy Council decision in *Abul Fata* was based on the rule against perpetuities which was unknown to the Hanafi law. IOR/L/PJ/6/1079.

⁸² *Meer Mahomed Israil Khan v Sashti Churn Ghose* [1892] ILR 19 Cal 412. Kozlowski got it wrong by stating that the endowment was invalidated in this case. Kozlowski (n 75) 139.

the pretext that the object of the waqf was to provide for the support of the descendants and kindred of the settlor. He did not see any illegality in the waqf which provided firstly for the support of the descendants and kindred of the grantor 'who might be in great want and need of support', with the surplus of the income of waqf property then going for purposes which were religious and charitable. These views were endorsed by his fellow judge, Mahmood J.⁸³

The year 1892 was crucial in the history of family awqāf in India. Not only were the above two judgments delivered during this year, but Ameer Ali's seminal work, *Mahomedan Law* was also published in the same year. He devoted a substantial part of his treatise to elaborate on the legitimacy of family awqāf under Islamic law by referring to every available text on Islamic law (*Fiqh*) and meticulously analysing all relevant reported case law. In two appendices, he also provided the translations of selected Sunnī and Shī'a texts on waqf in order to establish the legitimacy of family awqāf under Islamic law.⁸⁴

Further, it was in 1892 that one of the biggest legal battles ever fought in British Indian courts took place in the Calcutta High Court in *Bikani Mia v Shuklal Parsad*.⁸⁵ The division bench of two judges (W. Comer Petheram CJ and Hill J) before whom the case came up for hearing noted that there was a conflict of authorities laid down by the Calcutta High Court in *Rasamay Dhur Chowdhri v Abul*

⁸³ *Deoki Prasad v Inait-ullah* [1892] ILR 24 All 375. Interestingly, in the next year Mahmood J resigned following his differences with the Chief Justice, Sir John Edge. Guenther (n 24) 149.

⁸⁴ SA Ali, *Mahomedan Law* (Law Publishing Company 1976 (first published in 1892)) 192-567 and 750-94.

⁸⁵ [1892] ILR 20 Cal 116.

Fata Mahomed Ishak and Meer Mahomed Israil Khan v Sashti Churn Ghose.

Therefore, the case was heard before a Full Bench of five judges. The only question which was argued before the court was, ‘whether the disposition of the grantor’s property was a valid [family] waqf of property dealt with by the deed.’ Five justices meticulously analysed not only the classical texts of Islamic law but also every reported case of the Indian High Courts and Privy Council related to this point. The resulting detailed judgment spread over one hundred pages. Given the high and critical importance of the issue, the law journal that reported the judgment also covered the arguments of legal counsels over an extra sixteen pages.

Bikani Mia, who was the appellant in this case, had created a waqf in favour of his children and wife generation after generation, and in the event of the extinction of his successive generations, the poor and beggars of Dacca were the beneficiaries. The creditors of Bikani brought the suit for the attachment of his properties. But he claimed to be holding the properties as a *mutawalli*, meaning that such properties being held under the waqf were not liable to be attached and sold for his personal debts. The subordinate judge noted that the evidence showed the waqf was established *bona fide* when Bikani was solvent. Further, he observed that Bikani had created the waqf shortly before his departure for pilgrimage to Makkah, and being an old man with poor health, Bikani had little hope of returning alive. Therefore, there was no evidence that the waqf was created to defraud current or future creditors. However, he held the waqf deed invalid because the benefit to the poor was a ‘remote

contingency'.⁸⁶ The District Judge on appeal confirmed this judgment but held that a charge of Rupees 75 be allowed on the property in favour of religious purposes.⁸⁷

Bikani filed a second appeal in the Calcutta High Court. The Officiating Advocate General, James Tisdall Woodroffe pleaded the case for Bikani's creditors who were the respondents. He put forth three main arguments. First, as the case involved a Hindu party, the principles of justice, equity and good conscience rather than Muhammadan law should be applied. He pointed out that though the Transfer of Property Act 1882 excluded waqf from its scope of application, section 53 of the Act condemned such transactions. A family settlement with a merely nominal remainder to the poor was an undisguised case of *spes successionis* (mere possibility or expectation to succeed).⁸⁸ He appeared to anticipate Max Weber when he regarded Muhammadan law as the 'law of devices'⁸⁹ and attacked it in the strongest terms by stating:

The inference from the cases is that the right to defeat creditors and to evade the law of inheritance and succession was not preserved to Mahomedans, that the learned lucubrations of Mahomedan casuists [sic] were never seriously regarded, and these doctrines sloughed away, leaving only genuine developments...⁹⁰

⁸⁶ Ibid 135-36.

⁸⁷ Ibid.

⁸⁸ AH Oosterhoff, 'Great Expectations: Spes Successionis' (1998) 17 Estates, Trusts & Pensions Journal 181.

⁸⁹ BS Turner, *Weber and Islam: A Critical Study* (Routledge 1974) 110. M Rheinstein, *Max Weber on Law in Economy and Society* (Harvard University Press 1954) 240-41.

⁹⁰ [1892] ILR 20 Cal 116, 131.

He pointed out that Muhammadan law books were full of principles, which though religious, could never be asserted in the courts.⁹¹ Related to this point was his second argument that even if Muhammadan law was to be applied, it was to be applied so far as the laws of India allowed it to be observed. To support this proposition, he relied upon *Sheikh Kudratulla v Mahini Mohan Shaha*.⁹² In this case the majority of three judges held that a Hindu purchaser was not bound by the Muhammadan law of pre-emption. His final argument was directed against the family waqf. He argued that the family waqf was a modern development, founded upon purely family considerations and designed to circumvent Islamic inheritance law and to defraud creditors. He did not rely merely upon deductive reasoning and supported his contention by the fact that between 1798 and 1858 there were twenty reported cases decided by the *Sadr Diwani Adalat*—the highest court of appeal in Bengal. Only in three cases, benefits of a private character were conferred upon a *mutawallī*. One case was not proved and the other two were denied the character of inalienability because they withdrew the land *extra commercium*.⁹³ As we have seen above (under heading 2.1), this was not exactly the case. It was true that in two cases the judges of the *Sadr Diwani Adalat* refused to validate family awqāf,⁹⁴ but in one case the family waqf was validated.⁹⁵ And in four

⁹¹ Ibid.

⁹² 4 BLR FB 134.

⁹³ [1892] ILR 20 Cal 116, 132.

⁹⁴ *Ram Kishoon Das v Nusseeroodeen Mahomed* [1849] 5 SDA 65; *Haeje Nooroollah v Meer Waris Hossein* [1853] 9 SDA 411.

⁹⁵ *Doe Dem Jaun Beebee v Abdollah Barber* [1838] Fulton 344, 1 SCR 848.

other cases the waqf property was treated as a personal estate 'subject to certain trusts'.⁹⁶

Hill, who was presenting the case of the appellant, countered these arguments by stating that it was the policy of law from the earliest times to preserve native laws and institutions, which because considered to be of divine origin, could not be limited by importing foreign principles. He contended that the application of English law of perpetuities would cause great inconvenience as Muhammadan law had elaborate provisions for wills and trusts.⁹⁷ These views were endorsed by another attorney, Moulvi Mahomed Yusuf. He argued that the rule of perpetuities did not apply on waqf because the substance of waqf property (*'ayn*) was held by God. He distinguished waqf from *hiba* (gift). Whereas the former is a *sadaqa* (charity) and is for consideration for reward in the hereafter, the latter is without consideration.⁹⁸ The rest of the arguments of Woodroffe were refuted by Justice Ameer Ali J in his detailed judgment.

Regarding Woodroffe's objection that Muhammadan law should not be applied because one party was a Hindu, Ameer Ali contended that in *Jewun Doss v Shah Kubeer-ood-deen*⁹⁹ decided by the Privy Council in 1840, the waqf related

⁹⁶ *Khodabundha Khan v Oomutul Fatima* [1857] SDA 235; *Dalrymple v Khoondkar Azeezul Islam* [1858] 14 SDA 586; *Mahomed Munnoo Chowdree v Hajra Beebee* [1858] 14 SDA 1218; *Khaja Surwar Hossein v Khaja Syed Hossein Khan* [1858] 14 SDA 1028.

⁹⁷ [1892] ILR 20 Cal 116, 123.

⁹⁸ *Ibid* 126. He later elaborated on this point in his lengthy article in MM Yusoof, 'Review of the Law of Wakf' (1905) II The Calcutta Law Journal 109n.

⁹⁹ [1840] 2 MIA 390.

dispute involved a Hindu and a Muslim. But Muhammadan law was applied. He argued that this principle had been followed before and after this judgment. He further contended that from the earliest days of Islam to the present day there was an absolute consensus of opinion regarding the validity of waqf in favour of one's children, kindred and neighbours. He quoted *Fiqh* and *ḥadīth* texts in support of his contention, which included: *Fatāwā Qāḍī Khān*, *Fath al-qadīr*, *Fatāwā Barāmīka*, *Fatāwā al-hāwī*, *Kināyat al-maniyya*, *Zakhīrat al-fatāwā*, *Khazānat al-muftīn*, *Fatāwā al-Durr al-mukhtār*, *Majma' al-Anhār*, *Fatāwā al-anqarawī*, *Baḥar al-rā'iq*, *Ṣaḥīḥ Muslim* and *Ṣaḥīḥ Bukhārī*. He pointed out that Macnaghten's *Principles and Precedents of Moohummudan Law* contained *fatāwā* of Law Officers dealing with the distribution of income among the descendants of the grantee. He refuted Woodroffe's argument that the *Sadr Diwani Adalat* did not enforce any family waqf by arguing that the Select Reports of cases decided by the *Sadr Diwani Adalat* contained only selected cases. He pointed out that between 1765 and 1864 Muhammadan Law Officers adjudicated questions of Muhammadan law and in most cases they decided the dispute without parties going to the Courts of the East India Company 'with its interminable delays and complications—its plaints, its answers, its replications and rejoinders'.¹⁰⁰ He observed:

In case of wakfs for the support of the wakif's family, where the rules regarding the application of the income of the estate and the successor to the mutwalliship were laid down in precise terms, there was hardly much room for dispute; and when any dispute arose they were settled by the Fatwa of the Mufti or the Kazi out of Court...¹⁰¹

¹⁰⁰ [1892] ILR 20 Cal 116, 147.

¹⁰¹ Ibid.

This was not a very strong argument to rebut Woodroffe's point that the family waqf was only a later development in India to circumvent Islamic inheritance law.¹⁰² Ameer Ali was aware that the British judges and lawyers did not know much about classical Islamic law and tried to convince them by quoting from the classical texts as 'authorities'. In addition, he took great pains in analysing each case referred to by Woodroffe, but did not go back to the reports of the *Sadr Diwani Adalat* in order to confirm the exact number of waqf related cases. As we have seen above (under heading 2.1), Woodroffe did not quote all the reported cases decided by the *Sadr Diwani Adalat*.

Ameer Ali refused to accept the contention that the family waqf was a later development under Muhammadan law and asserted:

It is absurd to suppose that though their law and their religion recognised in explicit terms the lawfulness of wakfs constituting one's children and descendants as the immediate recipients of the benefaction, though the Mahomedan Code of India, the Fatawa Alamgiri, contained minute regulations concerning the same, there existed no such institution among the Mussulmans, and that they never availed themselves of the provisions of the law to create such wakfs.¹⁰³

While Woodroffe dismissed any recourse to classical Islamic legal authorities, the judges of the Indian High Courts and Privy Council considered the *Hidāya* translated by Hamilton as an authority for deciding cases related to Muhammadan law. Ameer

¹⁰² Lucy Carroll has rightly doubted the strength of this argument given the fact that family waqf cases did end up in courts when the waqf was attacked either by a deprived legal heir or personal creditors of managers or beneficiaries. Therefore, extra-judicial resolution of family waqf related disputes was not easy. Carroll, 'Life Interests and Inter-Generational Transfer of Property Avoiding the Law of Succession' (2001) 8 *Islamic Law and Society* 245, footnote 37, 260-61.

¹⁰³ [1892] ILR 20 Cal 116, 148.

Ali noted that Hamilton's *Hidāya* translated waqf as 'appropriation' and as every 'appropriation' could not be regarded as a waqf, Hamilton carefully added a footnote that it meant an appropriation of a 'pious and charitable nature'. He assailed the authority of the *Hidāya* by noting that it was an elementary work, taught in schools and Hamilton translated it not directly from Arabic but rather from its Persian translation. He rejected the assertion that the *Hidāya* did not mention family waqf by stating that as there was no difference of opinion amongst jurists regarding waqf in favour of children, the *Hidāya* did not deal with this point.¹⁰⁴ He then analysed the judicial authorities one by one and showed that there was no 'course of decisions' questioning the validity of family waqf as was asserted by Woodroffe. He argued that the family waqf was not a gift to circumvent Islamic inheritance law rather it stands on different footings.

Finally, he rebutted the criticism of family waqf by pointing out that Muhammadan law provided enough safeguards against fraudulent misuse of waqf, as a mortgaged property made into a waqf must be redeemed with other assets of the mortgager in case he dies without releasing it. Secondly, the waqf of an indebted person is invalid *ab initio*. He stated that Mahommedan law did not distinguish between a family waqf and awqāf for other purposes.¹⁰⁵

The majority decision was given by Ghose, Trevelyan and Prinsep JJ who did not deny the validity of the family waqf under Muhammadan law, but held that the

¹⁰⁴ Ibid 162-63.

¹⁰⁵ Ibid 174.

judicial interpretation of ‘charitable’ and ‘pious intention’ by English courts required that such awqāf should not be accepted as valid. They were convinced by Woodroffe’s assertion that there was a ‘course of judicial decisions’ that did not regard family awqāf as valid. After referring to a case on Hindu law, which regarded the advent of case law as a blessing for the people of India,¹⁰⁶ Trevelyan J held:

There can be no doubt that in questions of Mahomedan and Hindu Law alike, the course of the decisions of the Privy Council and of this Court must first be considered. Attempts to disturb the decisions by reference to texts and the vernacular writings of ancient lawyers tend only to unsettle the law and to disturb the rights of persons who have acted according to the decisions of the Court. *The Mahomedan lawyers of this day would be more likely to advise their clients and draw instruments in accordance with the view taken by this Court, than with regard to ancient futwas and text-books.*¹⁰⁷

The judges were convinced by the arguments of Ameer Ali that Islamic law allowed family awqāf. However, they found that the courts had doubted the legitimacy of such awqāf, and apart from a few cases where such awqāf were validated, in the majority of cases the courts had refused to accept their validity. They based their decision on the established principle that in case of any clash between case law and Muhammadan law, the former was to prevail. This was because any deviation from the established ‘course of decisions’ based on a different interpretation of ‘old and obscure texts’ was

¹⁰⁶ In *Hori Dasi Dabi v The Secretary of State for India in Council* [1879] ILR 5 Cal 228, 242 Louis Jackson J held: ‘I confess that it seems to me to be among the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights and their status, have passed into the domain of lawyers, instead of pundits and casuists [Muslim jurists], and in my opinion, the case before us may very well be decided on the authority of cases without following Sreenath, Achyatanand and others through the mazes of their speculations on the origin and theory of gift.’

¹⁰⁷ [1892] ILR 20 Cal 116, 207 (emphasis added).

unsafe for established titles.¹⁰⁸ However, the argument based on the rationale of disturbing the established titles could also be used in support of family awqāf. But it was not simply the case law which supported the invalidation of family awqāf, the rules based on ‘justice, equity and good conscience’ also endorsed it. Ghose J held:

Bearing in mind that the plaintiff is a person of a different persuasion from the defendant, and the Mahomedan Law according to Act XII of 1887, Section 37, is not to be applied in this case strictly, but *tempered by the rule of justice, equity, and good conscience*, is it right that we should give effect to this deed so as to deprive the creditor of his remedy? ... it seems to be a matter for serious consideration whether in a case like this, where a person, in the name of wakf, makes provisions for his family in perpetuity and enjoys the property himself, as before, as owner, it would be just, equitable, or consonant with good conscience that the settlement should be a protection against the claim of a creditor of a different persuasion.¹⁰⁹

This was the first time that the principles of equity were invoked in order to invalidate the family waqf. The fifth judge on the bench, Petheram CJ agreed with the conclusion of Ameer Ali that classical Islamic law validated family awqāf and the balance of judicial authorities was also in their favour despite the Privy Council decision in *Ahsanullah*. However, he found that the facts of the case established that the primary purpose of the impugned waqf was to create a family estate, which was not valid under the doctrine laid down by the Privy Council. He sided with the majority and dismissed the appeal.¹¹⁰ It must be noted that all five judges unanimously observed the legality of family waqf under classical Islamic law, but three of them held that such a waqf was invalid under case law. This disproves the

¹⁰⁸ Ibid 224-25. Held on the authority of the Privy Council decision in *Chotay Lall v Chunnoo Lall* (Bengal) [1878] UKPC 43, ILR 4 Cal 744, 755.

¹⁰⁹ Ibid 203-04 (emphasis added).

¹¹⁰ Ibid 235.

thesis that English judges in invalidating family waqf failed to understand Islamic legal texts correctly.

This case was the last desperate attempt by the proponents of the family waqf led by Ameer Ali to protect it from a declaration of invalidation by the Privy Council that was looming after *Ahsanullah* and it proved to be a failure. However, the supreme judicial authority, the Judicial Committee of the Privy Council in London had yet to put its final stamp of authority on the decisions of the Indian High Courts. This was done in the famous *Abul Fata* case in 1894.

2.3.3 Declaration of Invalidation of Family Awqāf: *Abul Fata*

The Privy Council in *Abul Fata v Russomoy Dhur* endorsed the High Court decision by declaring the family waqf invalid for being illusory because its primary objective was to serve for the ‘aggrandisement of a family’ and the possibility of the poor benefiting from it was minimal:

It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on earth one of those objects whom the donors really cared to maintain in a high position...¹¹¹

Having considered the authorities in support of the family waqf, their Lordships held that the opinion of learned Muhammadan lawyer [Ameer Ali] was founded upon ‘texts of an abstract character’ and upon ‘precepts very imperfectly stated’. Lord

¹¹¹ (Bengal) [1894] UKPC 64, 22 IA 76, 89.

Hobhouse, the author of the judgment, clarified that the decision in *Ahsanullah* did not displace Muhammadan law in favour of English law and endorsed the proposition that Muhammadan law ought to govern a purely Muhammadan disposition of property. However, he made it clear that only the judges were authorised to state what was Muhammadan law.¹¹² Their Lordships deemed it appropriate not only to do justice amongst the parties but also with Muhammadan law by interpreting it appropriately:

But it would be doing wrong to the great lawgiver [Prophet Muhammad] to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words.¹¹³

This judgment did not criticise the law of waqf rather it showed inconsistency within the various branches of the Islamic legal system.¹¹⁴ The family waqf was in conflict with not only Islamic inheritance law but also the Islamic law of gifts. As the Islamic law of gifts appeared to be more rational and closer in resemblance to the rules of English law, it was preferred over the ‘irrational’ law of waqf. This might be regarded as Lord Hobhouse’s ‘misunderstanding’ or ‘misinterpretation’ of Muhammadan law.

But the fact that he did not refer to Baillie’s translation of the *Fatāwā al-*

¹¹² Ibid 82-85.

¹¹³ Ibid 87.

¹¹⁴ During the same period, French Orientalists portrayed family endowments and Islamic inheritance law as mutually exclusive and hence incompatible with each other. DS Powers, 'Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India' (1989) 31 *Comparative Studies in Society and History* 535, 554.

‘Ālamgīriyya, which specifically allowed family awqāf shows that he did not want to apply the correct provisions of Muhammadan law if they were in conflict with public policy. Kozlowski has rightly pointed out that this judgment was based on the consideration of English legal principles rather than the injunctions of Islamic law as is evident by its language. Such as its reference to gifts which established an ‘inalienable income for unborn generations’ or freedom from ‘liability to creditors’.¹¹⁵

The remarkable feature of this judgment is that it introduced the idea of inconsistency of waqf law with the law of gifts for the first time.¹¹⁶ Despite the fact that in *Ahsanullah* the waqf was regarded as a gift to charity, the point of inconsistency between waqf law and gift law was not raised in any earlier judgment. The summary of the arguments of lawyers preceding the judgment reported in the journal shows that this point was not raised by the defendant’s lawyers.¹¹⁷ Likewise, the pleadings filed on behalf of the Respondents before the Privy Council did not mention this as a point of defence.¹¹⁸ As we have seen above, the family waqf was also criticised for its inconsistency with rigorous Islamic inheritance law and for violating the English rule against perpetuities. By establishing the inconsistency of family awqāf with the Islamic law of gifts, Lord Hobhouse seemed to have outmanoeuvred the proponents of the family waqf. Unlike the majority judges in *Bikani Mia*, he did not concede that Muhammadan law allowed family awqāf, but that

¹¹⁵ Kozlowski (n 75) 148.

¹¹⁶ Interestingly, in the early twentieth century a French jurist, Marcel Morand, also raised the same point while criticising family endowments in Algeria. He regarded a family endowment as a gift rather than a legacy. Powers (n 113) 548-51.

¹¹⁷ [1894] 22 IA 76-82.

¹¹⁸ Case Records *Abul Fata v Russomoy Dhur* [1894], *LI*, vol 382, shelf mark 128 c.

the ‘course of judicial decisions’ invalidated it. Rather, he was all praise for the ‘great lawgiver’ and blamed only his followers who failed to comprehend their own law. Lord Hobhouse fell short of launching a direct attack on the wealthy Muslim elites who were trying to take refuge behind their religion in order to avoid the rigor of not only their own inheritance law but also the new regime of property rights in land introduced by the British.

It must be noted here that had their Lordships at the Privy Council wanted to invalidate the subject waqf within the provisions of Muhammadan law, there might have been a little difficulty. As mentioned earlier, the waqf under consideration was invalid under Muhammadan law as the settlors had cancelled the waqf because of their financial hardships. The rules under the Ḥanafī school allow a settlor who is inflicted with poverty to get his waqf cancelled by a *qāḍī*.¹¹⁹ Thus the real question in this case was whether the cancellation of the waqf by the settlors was valid. As the proponents of the family waqf were adamant on proving it valid, while the majority of the judges of the courts were not prepared to accept this assertion, the actual legal question was lost in this tussle at both trial and appellate levels.

The reasoning in this judgment appears to be ‘backward’, the conclusion reached first and justifications laid down later. It is true that under English law no strict distinction was made between the law of gifts and private trusts. In fact like a waqf, trust overlapped with several legal forms such as gift, contract and

¹¹⁹ Al-Shaykh Nizām (n 53) 1045.

conveyance.¹²⁰ It is hard to believe that Lord Hobhouse, who had served in India as the Law member of the Imperial Legislative Council for about five years, could have confused or misunderstood the operation of various branches of Muhammadan law.¹²¹ It was not farfetched to regard waqf either as an exception in the general Muhammadan law of gifts or a special type of gift on which the general rules do not apply. Lord Hobhouse was right to detect inconsistency between three branches of the Muhammadan legal system. But such an inconsistency could also be found within the English legal system where, for instance, under the doctrine of privity of contract, third parties could not enforce their rights, but this right was specifically provided to the beneficiaries of trusts.¹²² As a young barrister, Hobhouse had established himself as an expert on trusts and was a proponent of freeing the trust property from the conditions laid down by settlors.¹²³ In fact, he was famous for his extreme views

¹²⁰ GS Alexander, 'The Transformation of Trusts as a Legal Category, 1800-1914' (1987) 5 Law and History Review 303, 304. In the early nineteenth century trust was also distinguished from bare powers. 333.

¹²¹ Hobhouse succeeded Sir James Fitzjames Stephen as the Law Member in the Governor General's Council in May 1872. On his departure to India he was advised to slow down the process of codification that was set at a great pace by his predecessors, Henry Maine and James Fitzjames Stephen. He took this as an opportunity, and began the task of consolidating the already codified laws such as civil and criminal procedure codes. He also contributed in the codification in the form of two important statutes: the Specific Relief Act 1877, which was based on the principles of equity and as an equity lawyer he took a keen interest in its drafting; and the Indian Transfer of Property Act 1882, which was enacted after he left India. LT Hobhouse and JL Hammond, *Lord Hobhouse, a Memoir* (Edward Arnold 1905) 59, 84-87, 91-131.

¹²² *Tweddle v Atkinson* [1861] 121 ER 762 (authority for the doctrine of privity of contract). *Les Affreteurs Reunis v Walford* [1919] AC 801 (authority for constructive trust in a third party rights under the contract). But in a later contract law case the constructive trust argument was rejected. *Re Schebsman (Deceased) ex parte Official Receiver* [1944] Ch 83. R Flannigan, 'Privity - the End of an Era (Error)' (1987) 103 LQR 564 (arguing for the recognition of third party's right under a contract by showing historical and theoretical inconsistencies in the privity doctrine). This right was finally provided under the Contract (Rights of Third Parties) Act 1999.

¹²³ C. E. A. Bedwell, 'Hobhouse, Arthur, Baron Hobhouse (1819-1904)', rev. H. C. G. Matthew, *Oxford Dictionary of National Biography*, OUP, 2004, <http://www.oxforddnb.com/view/article/33902>, accessed 6 March 2012.

amongst the reformers of charitable trusts.¹²⁴ He delivered various lectures in the 1870s arguing that property held in charitable trusts and family settlements, what he called ‘Dead Hands’, should be in continuous circulation with minimal burdens for its efficient use.¹²⁵ The main subject of his criticism in these lectures was the ‘liberal view’ of John Stuart Mill who supported endowments as a manifestation of individual liberty.¹²⁶ Because of his radical views on legal reform regarding charitable trusts, when he was appointed a charity commissioner in 1866, he had to defend himself by stating that his private views did not prevent him administering existing law in an impartial manner.¹²⁷

In the next edition of his treatise, Ameer Ali answered the various points raised in the above judgment. He clarified the difference between the Muhammadan law of gift (*hibā*) and the law of waqf by arguing that the former is an absolute transfer of property to human beings while the latter is a transfer of property to God Almighty for the benefit of mankind. He asserted that under statutory law, the courts were bound to apply the Muhammadan law of waqf as it was accepted by Muslim lawyers and jurists, even though it might appear to them inconsistent with the

¹²⁴ D Owen, *English Philanthropy 1660-1960* (OUP 1964) 255-56, 281, 325-29.

¹²⁵ SA Hobhouse, *The Dead Hand* (Chatto & Windus 1880).

¹²⁶ Ibid, 51-53, 84-85. The main subject of criticism of J S Mill’s short essay was the view purported by one, Mr Fitch, who argued that given the enormous mischief done in the name of benevolence, it should be made illegal to devote any money to public objects without the permission of the state. JG Fitch, 'Educational Endowments' (1869) 79 *Fraser’s Magazine* 11; JS Mill, 'Endowments' (1869) v *New Series Fortnightly Review* 377, 378.

¹²⁷ Letter dated 28 June 1871 by Hobhouse to Lord Carnarvon. The latter had criticised Hobhouse in the House of Lords while discussing the schemes of the Charity Commission. Hobhouse and Hammond (n 121) 38-39.

Muhammadan law of gift.¹²⁸ Wilson in the first edition of his *Anglo-Muhammadan Law* noticed the overriding impact of waqf law over Muhammadan law of gifts and suggested that it might have been the case that 'at one period the law of waqf was so construed as to have nearly the same effect as the English Statue *De Donis conditionalibus*'.¹²⁹ In the second edition of his treatise, he was however inclined to think that the law of waqf and the law of gifts might exist at the same time despite apparent inconsistency. He noted that the tradition of Umar, which was quoted as an authority for the validity of a family waqf, might have been invented later in order to justify the pre-existing foundations established by the Companions of the Prophet in favour of their descendants.¹³⁰

In a separate piece of writing, Wilson agreed with Ameer Ali on the issue of the validity of family waqf under Muhammadan law. However, he differed from him with respect to public policy and supported the view that the decision of the Privy Council should stand and could only be changed if the Muslim community (including both landless and landowners) unanimously agreed for such change.¹³¹ As we will see later, this agreement was reached and the Mussalman Wakf Validating Act was passed in 1913.

¹²⁸ Ali (n 84) 344-48.

¹²⁹ Wilson (n 15) 283.

¹³⁰ RK Wilson, *Anglo-Muhammadan Law* (2nd edn W. Thacker & Co 1903) 500-02.

¹³¹ A Majid, 'Wakf as Family Settlement among the Mohammedans' (1908) 9 *Journal of the Society of Comparative Legislation* 122, 139.

3. Aftermath of *Abul Fata*

Following the judgment in the *Abul Fata* case ‘substantial dedication of the property to charitable uses’ became the standard for the validity of awqāf. In *Mujib-un-Nisa v Abdul Rahim*¹³² and *Moulvi Saiyid Muhammad Munawwar Ali v Rajea Bibi*,¹³³ the awqāf were declared invalid because their primary object was the ‘aggrandisement of the family estate’ and to ‘continue the pomp and dignity of the family’.

The waqf deed in *Mujib-un-Nisa* was a paradigm case of a pure family waqf. The deed though executed in 1889 ignored all judicial authorities and the settlor not only vested all properties in himself as the first *mutawallī* who was not only to distribute the proceeds from his properties amongst his wife and daughters (he did not have a son), but he could also not be called to account by any beneficiary. As if this was not enough, the deed provided that the surplus income was to be invested in buying new properties that would also become waqf property. This ‘waqf *khandani*’ (family endowment) was, however, established ‘in order to secure benefit and honour in the next world’. The only possibility of public benefit could arise in case of the extinction of the settlor’s descendants as the deed provided that in such a case the political authorities were to take control of the property for the benefit of Muhammadans. The judgment was written by Lord Roberston while Lord Hobhouse and Sir Richard Couch were the members of the Committee. Their Lordships held:

Indeed the theory of the deed seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual

¹³² (Allahabad) [1900] UKPC 65, 23 ILR (All) 233.

¹³³ (Allahabad) [1905] UKPC 16.

application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable purpose. It is superfluous in the present day to say that this is not the law.¹³⁴

In the *Maulvi S M Ali* case the only question which the Privy Council had to decide was whether the waqf deed dated 1881 was valid. The waqf was created by a husband and wife in favour of their own selves and after their death their children were to benefit from it generation after generation. The main object of the waqf was that the property 'should remain for ever in the hands of one person, whereby our name and memory, and the pomp and dignity of the estate may continue'. Following its earlier decisions, the Privy Council declared the waqf invalid.¹³⁵

The courts were careful in applying the 'substantial dedication' test and the Privy Council ruled that regard must be had to the substance rather than the language.¹³⁶ However, it did not mean that no assets could be settled for the benefit of the family members as the standard required 'substantial dedication' not the *sole* dedication of property. Thus in *Mutu K. A. Ramanadan Chettiar v Vava Levvavi Marakayar* it was held that family members could benefit from the waqf property if that was the secondary and subsidiary object of a charitable waqf.¹³⁷ In this case, though the judgment was written by Lord Atkinson, Ameer Ali was one of the members of the Committee. His influence was visible because the waqf in this case

¹³⁴ *Mujib-un-Nisa v Abdul Rahim* (Allahabad) [1900] UKPC 65, 23 ILR All 233, 245.

¹³⁵ (Allahabad) [1905] UKPC 16.

¹³⁶ *Balla Mal v Ata Ullah Khan* (Lahore) [1927] UKPC 61.

¹³⁷ (Madras) [1916] UKPC 107, 44 IA 21.

could have failed because it provided for the future accumulation of property. It was held:

Their Lordships take the view that, having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities. That was their main and paramount object. The secondary and subsidiary object was to secure for their families and descendants any surplus that might remain over after the needs of the charities had been satisfied. *As the gift for the charities was perpetual, it was necessary and right that the provision for capturing any possible residue should also be perpetual...*¹³⁸

This judgment in effect deviated from the earlier authorities of the Privy Council for not requiring ‘substantial dedication to charity’ and by laying down a new test of ‘dominating purpose and intention of the grantors’. However, earlier authorities could be distinguished and that is why the judgment did not specify the extent to which it departed from them on this point. But this judgment had only a limited effect because meanwhile in 1913 the Wakf Validating Act was passed, though the Privy Council refused to give it a retrospective effect in a later decision.¹³⁹

The suit in *Mutu K A Ramanadan* was filed by the judgment creditor for the sale of waqf properties. The Madras High Court had followed the principles laid down in the cases of the Privy Council by declaring the interest for the family members as invalid and the whole property was to go for charitable purposes. This was a novel synthesis of classical Islamic law and the principles laid down by the Privy Council,

¹³⁸ Ibid 29 (emphasis added).

¹³⁹ *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153.

suggested by Benson and Abdur Rahim JJ.¹⁴⁰ In the cases decided earlier, when the courts declared a waqf invalid, the property was distributed amongst the legal heirs. However, their Lordships at the Privy Council did not appreciate this aspect of the High Court judgment and declared the deed of waqf valid without clarifying whether they agreed with the opinion of the High Court judges or not. In another case, it was held that the family waqf was valid to the extent the interest was reserved for charitable and religious purposes, though it failed to the extent the benefits were reserved for the settlor himself.¹⁴¹ However, this contention was rejected by the Privy Council because it was found contrary to the principles of Muhammadan law.¹⁴²

4. Custom and Family Awqāf

Custom could have been invoked in order to provide a justification for family awqāf. British administrators in India wanted to achieve uniformity of laws, but custom posed a problem by making it difficult for judges to determine a variety of customary practices. However, both executive and judiciary gradually came to understand the diversity of India. After their conquest of the Punjab, the British realized that Muslims and Hindus did not adhere to their respective religious laws, rather tribal customs governed property and inheritance. Even in other parts of India, some Muslim communities either followed customary practices or the Hindu law of inheritance. For

¹⁴⁰ *Muthukana Ana Ramanandham Chettiar v Vada Levvai Marakayar* [1916] ILR 34 Mad 12.

¹⁴¹ *Hajee Kalub Hossein v Mussumat Mehrum Beebee* [1872] 4 NWP 155.

¹⁴² *Abadi Begum v Bibi Kaniz Zainab* (Patna) [1926] UKPC 92, 54 IA 33.

instance, the wealthy merchant community of Bombay, *Khojah* or *Cutchi Memon*, was often described as a living Muslim but a dying Hindu.¹⁴³

However, the Privy Council had laid down a very strict criterion for the recognition of custom¹⁴⁴ following the principles of English law.¹⁴⁵ The application of English law tests for the determination of the validity of custom in India had caused much confusion.¹⁴⁶ Therefore, a plea based on custom for the validity of family waqf in India was never raised before the courts. Kozlowski refers to a case of the *Khojah* community of Bombay in which he asserts that such a plea was made.¹⁴⁷ But the judgment in this case showed that such a plea was not actually raised. The family settlement in this case was attacked for lack of transfer of possession of the property, its being revocable and contravening inheritance law. Beaman J observed that though the wealthy *Khojah* community wanted to apply Hindu law as their custom, there was no judicial authority to this effect. He advised the community to ask the government

¹⁴³ PB Vachha, *Famous Judges, Lawyers and Cases of Bombay* (N. M. Tripathi 1962) 92.

¹⁴⁴ The Privy Council in several judgments held that in order for a custom to be applicable, it must be ancient, invariable and clearly proved. *Ramalakshmi Ammal v Sivananantha Perumal* [1872] IA 1 (Sup), 14 MIA 570. Another judgment puts an additional restriction by requiring the custom to be certain, reasonable and being in derogation of ordinary law, must be construed strictly. *Hurpurshad v Sheo Dyal* (Bengal) [1876] UKPC 35, 3 IA 259. The existence of custom must be proved in each case. *Abdul Hussein Khan v Bibi Sona Dero* (Sind) [1917] UKPC 89, AIR 181 (PC). These principles were subsequently applied in a number of cases. See for example *Mahomed Ibrahim v Sheik Ibrahim* 1922 AIR 59 (PC) and *Chandra Shekhar v Raj Kunwar* 1926 AIR 91 (PC).

¹⁴⁵ Blackstone required a special custom to be proved in the same way as the thing in dispute was to be proved, unless the particular custom was already determined and recorded by the court. Moreover, in order to be legally valid, the custom must be ancient, uninterrupted, peaceably enjoyed, legally reasonable, certain, and consistent with other customs. Even after fulfilling these criteria, a custom in derogation of the common law was to be strictly construed and remained within the prerogative of the king. W Blackstone, *Commentaries on the Laws of England* (1 of 4 vols, Clarendon Press 1765) 74-79.

¹⁴⁶ LJ Robertson, 'The Judicial Recognition of Custom in India' (1922) 4 *Journal of Comparative Legislation and International Law* 218.

¹⁴⁷ Kozlowski (n 75) 151.

to pass a statute in order to avail themselves of this right.¹⁴⁸ However, in one case customary practices were taken into account in order to determine whether the income of waqf property was ‘substantially dedicated’ for religious and charitable purposes.¹⁴⁹

More than half a century later, an opportunity arose for the Privy Council to review its decision in *Abul Fata* on the pretext that making of a mixed family waqf was customary. In a case from Eastern Africa, the register of waqf deed produced by the Waqf Commissioner showed that a waqf in favour of children and other relatives from generation to generation and finally to a mosque was a common kind of waqf. Their Lordships observed:

A study of the question shows that while the Mohamedan law, uninfluenced from outside sources, permitted perpetuities and the erection of wakfs for family aggrandizement solely, the influence of English Judges and of the Privy Council has gradually encroached on this position until decisions given quite recently have decided that such wakfs are illegal, and it has now been clearly established that a wakf for family aggrandizement or security, the ultimate beneficiaries of which are the poor, whether mentioned by name or supplied by implication, are invalid.¹⁵⁰

The appellant’s counsel had argued that the Privy Council should review its decision in *Abul Fata*, and distinguished his case as the parties were followers of the Shāfi‘ī school. Both these contentions were rejected. Firstly, no distinction between the

¹⁴⁸ *Casamally Jairajbhoy Peerbhoy v Sir Currimbhoy Ebrahim Bart* [1911] ILR 26 Bom 214, 260-61.

¹⁴⁹ Customary practice was taken into account in order to reach the conclusion that a waqf for *fāteha* and *khatam sharīf* (recitation of the *Qur’ān*) that required Rupees 500 per annum of a property that generated an annual income of Rupees 850 reserved substantial income for religious and charitable purposes. *Akbar Yar Khan v Phul Chand* [1897] ILR 19 All 211.

¹⁵⁰ *Fatuma Binti Mohammed Bin Salim Bakhshuwem v Mohammed Bin Salim Bakhshuwem* (Eastern Africa) [1951] UKPC 27.

Ḥanafī and Shāfi‘ī schools could be made on this point. Secondly, *Abul Fata* was followed in many decisions by the Privy Council eg in 28 IA 23 [*Mujib-un-Nisa*]. Their Lordships noticed that only the enactments of the Indian Legislature in 1913 and 1930 validated such a waqf in India.¹⁵¹

5. Muslim Elites, ‘*Ulamā*’, Politicians and the Legislature

The reaction to the Privy Council decision in *Abul Fata* was immediate. In fact, after the decision of the Calcutta High Court and before its confirmation by the Privy Council in *Abul Fata*, Nawab Ahsanullah Khan, a prominent landlord of Bengal expressed his concerns to the Viceroy of India regarding court decisions on family awqāf. Subsequently, he requested the government pass special legislation to allow the creation of a permanent endowment for the maintenance of the dignity of his family and his titles. As a result the Indian Perpetuities Bill 1893 was proposed. It envisaged a settlement administered by trustees who were to be a corporation with perpetual succession and a common seal. However, it was not enacted by the government.¹⁵²

Wealthy Muslim elites persuaded various sections of society to mount pressure on the government to enact a piece of legislation for validating family awqāf. Memorials were sent to provincial and central governments. The issue was raised in

¹⁵¹ The Court of Appeal for Eastern Africa in its decision in 1946 in *Said bin Mohamed bin Kassim el Reimi v Wakf Commissioners for Zanzibar* [1946] 13 EACA 32 held itself bound by the Privy Council decision in *Abul Fata*. Therefore, the Legislature of Zanzibar passed a Wakf Validating Decree 1946 which corresponded to the Indian Acts of 1913 and 1930. But no such law was passed in Kenya, therefore, the Privy Council did not consider this enactment.

¹⁵² IOR/L/PJ/6/345, File 781: 5 Apr 1893; A Bill to permit the settlement of property in perpetuity by way of endowment for hereditary and other titles [The Settlements Act, 1894] IOR/L/PJ/6/367, File 290: 26 Jan 1894.

the House of Lords drawing the government's attention towards these memorials.¹⁵³ Both the Indian National Congress and the Muslim League, despite having sharp differences of opinion upon many issues, passed resolutions in favour of such an enactment.¹⁵⁴ A campaign in the newspapers representing the views of Muslims was also launched for this purpose.¹⁵⁵ Although a small number of '*ulamā*' opposed the family waqf because of its conflict with Islamic inheritance law, the majority expressed their views in its favour by issuing *fatāwā*. Favourable *fatāwā* were also solicited from the Arab world. References were made frequently to the other Muslim countries where family awqāf were legitimate and widespread.¹⁵⁶ In addition to the traditional '*ulamā*', English trained Muslim intelligentsia, both local and foreign educated, supported family awqāf. Amir Ali, Shibli Numani, Mian Muhammad Shafi,

¹⁵³ IOR/L/PJ/6/400, File 1104: 5 July 1895.

¹⁵⁴ The decision in *Abul Fata* was used to show that the English judges failed to appreciate the indigenous laws, and by using it as a pretext, the Indian National Congress passed a resolution in 1901 to increase the number of native judges. The Report of the Seventeenth Indian National Congress held at Calcutta, 26th, 27th & 28th December 1901, Indian National Congress, Calcutta 1902, 106. Six years later, the Congress passed a resolution in its meeting requiring the government to appoint a commission to determine whether the Privy Council decision on the family waqf was erroneous 'having regard to the law, usage and sentiments of the Mohammedan people', and if found as such to take action in order to set the law right. The Twenty-second Indian National Congress held at Calcutta, 26-29 December 1906, Indian National Congress, Calcutta January 1907, 62.

¹⁵⁵ A campaign in favour of the family waqf was launched in the columns of *The Moslem Chronicle* right after the Privy Council decision in 1894 and its editor Abdul Hamid was a committee member formed by the Central National Muhammeden Association. MY Abbasi, *The Political Biography of Syed Ameer Ali* (Wajidalis 1989) 280-81.

¹⁵⁶ IOR/L/PJ/6/1079/1261.

Ali Imam, Muhammad Ali Jinnah and many others vehemently supported family awqāf.¹⁵⁷

Supporters of such awqāf were also won from within the ranks of the English judges. Comer-Petheram, former Chief Justice of the Allahabad and Calcutta High Courts and Sir Raymond West, former judge of the Bombay High Court and member of Indian Law Commission supported family awqāf. Both had expressed favourable views to family awqāf in their judgments. Raymond West was the author of the judgment in *Fatma Bibee v The Advocate General of Bombay*,¹⁵⁸ one of the earliest cases which supported family endowments. Comer-Petheram in *Bikani Mia* regarded family awqāf as consonant with Muhammadan law.¹⁵⁹ After his retirement he wrote an article in the *Law Quarterly Review* of 1897 in which he argued that the family waqf was permissible under *Shari'a*. He quoted from some books from Egypt and Turkey that regarded such endowments as valid and proposed that the Privy Council should take this point into account when the next case on this point might be raised before it.¹⁶⁰

¹⁵⁷ Kozlowski (n 75) 156-91. Some Muslim lawyers opposed the Wakf Validating Bill because it was regarded to be against the spirit of Islamic law by protecting 'immoral heirs' and circumventing inheritance law. See the views of Nizamuddin Hassan and Muhammad Ishfaq of the Calcutta High Court. However, another lawyer of the Calcutta High Court, Moulvi Muhammad Yousuf who also appeared in *Bikani Mia*, not only wrote a lengthy article spreading over two hundred pages in the *Calcutta Law Journal* in 1905, he also wrote a comment of twenty six pages on the Wakf Bill wherein he proposed a new Bill based on original Arabic sources of Muhammadan law. IOR/L/PJ/6/1079/1261.

¹⁵⁸ [1881] ILR 6 Bom 42.

¹⁵⁹ Kozlowski ignores Petheram's observations in *Bikani Miya*, and states that as a judge he always endorsed the view taken by the Privy Council on the family waqf and reproaches him for changing his mind after retirement. Kozlowski (n 75) 168.

¹⁶⁰ WC Petheram, 'The Mahomedan Law of Wakf' (1897) 13 LQR 383.

Sir Raymond West after his retirement taught Indian and Islamic law at Cambridge University between 1895 and 1907. He invited Abd al-Majid, then a law student and the head of a Wakf Committee in London,¹⁶¹ to deliver a paper entitled ‘*Wakf as a Family Settlement*’ at a meeting of the Society of Comparative Legislation. The paper was commented upon by Sir Roland Wilson, the author of the *Anglo-Muhammadan Law*. He agreed with Majid that Muhammadan law permitted a family waqf, as all schools held such settlement valid and it was a sufficient reason for the British courts administering Muhammadan law to hold them valid. However, he differed from Majid on policy considerations and wondered whether the Muslim community (both landholders and landless) would be in favour of ‘subjecting the living to the wishes or caprices of the dead’.¹⁶² In his separate comments on the paper, West concluded by referring to Islamic history where rulers found it convenient to interfere in awqāf on the pretext of their being in conflict with inheritance law and placing a large proportion of the land *extra commercium*. Therefore, he argued that the decisions of the Privy Council could be supported on purely Muhammadan principles. However, by acknowledging that unlawfulness of perpetuities was repugnant to Muhammadan sensibilities, a moderate law of entails limiting the right of disposition to two or three generations would be acceptable by the Muslims as a reasonable compromise between tradition and public policy.¹⁶³

¹⁶¹ IOR/L/PJ/6/1079/1261.

¹⁶² Majid (n 130) 139. He later published three articles on Muhammadan law in the *Law Quarterly Review*. SA Majid, 'Historical Study of Mohammedan Law' (1911) 27 LQR 28; SA Majid, 'Historical Study of Mohammedan Law II' (1912) 28 LQR 355; SA Majid, 'Moslem International Law' (1912) 28 LQR 89.

¹⁶³ Ibid 140-41. The rule against perpetuities under English law was a reflection of this compromise between the competing requirements of free alienability of land and freedom of control for the landed classes. This rule limits an interest to one life, existing at the time of the creation of the interest, and twenty one years. GL Haskins, 'Extending the Grasp of the Dead Hand: Reflections on the Origins of

Such an arrangement was already envisaged under the Oudh Settled Estates Act 1900 and the Madras Impartible Estates Act 1902.¹⁶⁴ The former was intended to protect tenants who did not feel secure when the ownership of land was transferred to traders and moneylenders who did not belong to their clan or caste. The latter was a temporary enactment for the preservation of a limited number of ancient *zamindārs* and their estates which were provided in a schedule. The latter Act also had a sunset clause and was required to be renewed in 1903. After some reluctance, the Oudh Settled Estates Act 1900 was extended to Bengal under the Bengal Settled Estates Act 1904. These statutes showed that the government was willing to depart from its policy considerations in favour of political expediency in order to appease the landed elites.¹⁶⁵ The creation of such exceptions was also an exercise of sovereignty by the colonial rulers, who exclusively could determine the rights in land.

The Bengal Settled Estates Act 1904 empowered landlords to create a permanent trust of their estate in favour of their children and dependants. The estate placed under the protection of the Act could not be partitioned under the rules of inheritance law and the rights of creditors to seize assets for the non-payment of debts were also limited. These concessions were not contrary to the privileges enjoyed by

the Rule against Perpetuities' (1977) 126 *University of Pennsylvania Law Review* 19. For further details see JC Gray, *The Rule Against Perpetuities* (Little, Brown, and Company 1886); LM Simes, *Public Policy and the Dead Hand* (University of Michigan Law School 1955); TP Gallanis, 'The Rule Against Perpetuities and the Law Commission's Flawed Philosophy' (2000) 59 *The Cambridge Law Journal* 284.

¹⁶⁴ Letter from the Government of Bengal, dated 29 January 1903. IOR/L/PJ/6/1079/1261.

¹⁶⁵ Extracts from an Abstract of the Proceedings of a Meeting of the Council of the Lieutenant-Governor of Bengal, held on Saturday, 8 August 1903. IOR/L/PJ/6/672, File 709.

landowners in England during that time,¹⁶⁶ but they came with a caveat in India. For instance, under the 1904 Act not only was the permission of the government required in order to create such a settlement, a hefty stamp duty to the tune of one-fourth of the annual net profits of the settled estate was also imposed. Even more frightening for landlords was the scheme of supervision of the settled estates by the state. Although the estate, which also included movables such as jewellery could not be alienated, the Court of Wards could take over the property in case of default in payment of taxes or debts.

Apart from the imposition of heavy cost and close official supervision, the Act had some obvious defects. To avail protection under the Act, not only a lengthy procedure had to be followed but the landlord also had to submit a detailed list of his property along with its income. As against the provisions of the waqf deed which could be changed by the settlor if he reserved that right in the waqf deed, the provisions under the Act could not be changed without the sanction of the government. Small wonder if the Act did not receive a warm reception. After five years of its enactment only two estates were registered under it. One by a Hindu, Maharaja Bahadur Sir Jotindra Mohan Tagore and the other by a Muslim, Saiyid Nawab Ali Chaudhri Khan Bahadur.¹⁶⁷ The majority of Bengali landlords thought that the Act gave the government too much power against their estates.¹⁶⁸ Still an alternative was available in the form of soliciting the passing of a special bill in

¹⁶⁶ AWB Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) 234-40.

¹⁶⁷ Letter dated 1 July 1909. IOR/L/PJ/6/1079/1261.

¹⁶⁸ Kozlowski (n 75) 163-64. Kozlowski states that the Act was passed in 1894. It appears to be a mistake.

favour of one's family providing immunity from the application of Islamic inheritance laws.¹⁶⁹ However, not every wealthy man could afford this option because of high associated costs.¹⁷⁰ This led smaller communities to have special laws passed for themselves in order to avoid segmentation of their family wealth through the operation of inheritance laws. The Cutchi Memons Act 1920, passed in favour of the merchant community of Cutchi Memons, was one such example.¹⁷¹ Earlier examples of opting out of Islamic inheritance law could be seen in the form of the Oudh Estates Act 1869¹⁷² and the Bombay Hereditary Offices Act 1874.¹⁷³ Other examples of such statutes could also be found in the form of the Murshidabad Estate Act 1891 and the Jhansi Encumbered Estates Act 1882. A family trust could also be created under the Indian Trust Act 1882.¹⁷⁴ However, none of these alternatives provided the benefits which a settlor could enjoy under a family waqf.

However, this faculty to create a shield around capital under a family waqf was regarded as against public policy under English law. This was the main reason behind the suspicion of English judges about family awqāf, though not specifically

¹⁶⁹ Ibid 182. See Sir Churimbhoy Ibrahim Baronetcy Bill 1912. Two Parsi gentlemen were already awarded baronetcies which exempted their estates from alienation in 1860 and 1893. IOR/L/PJ/6/367, File 290: 26 Jan 1894.

¹⁷⁰ Para 3 of the letter dated 8 February 1902 to Chief Secretary to the Government of Bengal from Chief Manager of the heirs of Nawab Sir Ahsanullah Bahadur commenting on the Bengal Settled Estates Bill 1902 and requesting for passing legislation in favour of the Nawab's family. IOR/L/PJ/6/1079/1261.

¹⁷¹ However, their experience did not seem to go well and in 1938 they opted for the application of Muhammadan Laws of inheritance. See the Cutchi Memons Act 1938.

¹⁷² JGW Sykes, *A Compendium of the Law Specially Relating to the Taluqdars of Oudh* (Thacker, Spink & Co 1886).

¹⁷³ HS Phandis, *The Hereditary Offices Act* (2nd edn Arya Bhushan Press 1911).

¹⁷⁴ This point was raised by the Officiating Revenue and Judicial Commissioner, Baluchistan, Mr H. Dobbe in his comments on the Wakf Validating Bill. IOR/L/PJ/6/1079/1261.

mentioned in the judgments of the Privy Council and Indian High Courts. Therefore, when Muhammad Ali Jinnah introduced his draft Bill for legislative declaration for the validation of family awqāf, the main objection was raised on the ground of their potential misuse to defraud creditors. Being a practicing barrister and for sometime a presidency magistrate himself, Jinnah was cognizant of this legal defect in family awqāf. Therefore, eight out of the twelve sections of the proposed Bill addressed the issue of registration of family awqāf. Not only was the waqf required to be made in writing, signed by the settlor and attested by two or more witnesses, but it was also required to be registered within four months of its execution. The Statement of Objects and Reasons of the Bill described these clauses as ‘intended to secure authenticity of *wakfnama* and prevent fraud upon creditors or otherwise.’ (Clauses 4 and 5). Similarly, the registration of the will was required where such a waqf was to take effect after the death of the settlor (Clauses 10 and 11). Following the pattern of the Bengal Settled Estates Act 1904 and in order to provide further safeguards against any fraud, the deed of waqf was to be accompanied not only with a schedule of description of properties made waqf but also a schedule of any charge created by the settlor on the property intended to be comprised in the waqf and any decree outstanding against him (Clause 6). In addition, the Bill required that a schedule of properties owned by the settlor and their value to the best of his knowledge and belief should also be provided (Clause 6). A further restriction was proposed by empowering the Registrar who could refuse registration on finding that the charge on the settlor’s property intended to be dedicated was greater than the value of such property and the settlor did not have any other property to satisfy such charge (Clause 8). Penalties provided under the Indian Registration Act 1908 were also to be applied for similar offences under the Bill (Clause 12).

Thus every effort was made to ensure that the family waqf could not be used to defraud creditors. As the requirement of registration dealt with the procedural issues only and the substantive waqf law remained unaffected, the Bill did not interfere with the personal law of Indian Muslims. Secondly, there was enough evidence from Islamic legal history to support the measure of registration in order to curb fraudulent creation of awqāf.¹⁷⁵ Earlier the draft Bill proposed by the National Muhammadan Association of India under the guidance of Ameer Ali also proposed not only the registration of waqf deeds but also a closer supervision of waqf by the district judge.¹⁷⁶

In his speech, Jinnah highlighted the legal complications caused by a series of decisions, which created uncertainty as to what was meant by ‘substantial dedication to charity’ and ‘remote period’ in order to constitute a valid endowment.¹⁷⁷ He mentioned the *Abul Fata* case and referred to his question earlier in the last year asking whether the government wanted to set the law right. The government replied that they were not prepared to enact any legislation to upset the Privy Council decision, however, they were ready to consider any specific proposals approved by

¹⁷⁵ Historically a system of the registration of awqāf existed under the Islamic legal system and a *qāḍī* was assigned the duty to not only register awqāf but also to supervise their operations. The evidence of the existence of this mechanism is also available in India. The waqf deed executed in 1832 is described as affixed with the seal of a *qāḍī* and the memorandum of registry in the office of a *qāḍī* was written on the back. *Doe Dem Jaun Beebee v Abdollah Barber* [1838] Fulton 344, 1 SCR 848.

¹⁷⁶ Letter dated 14 February 1908. IOR/L/PJ/6/1079/1261.

¹⁷⁷ *PILC*, 1910-1912, IOR/V/9/36-38, 481.

the Muslim community generally.¹⁷⁸ The assumption in the government's reply was that the Muslim community itself was divided on this issue.

Although the classical legal texts unanimously sanctioned the validity of family awqāf, there was a difference of opinion among 'ulamā' about the use of such waqf to circumvent Islamic inheritance law. The conflict between such awqāf and inheritance laws was obvious. It did not go unnoticed by classical jurists who advised that preferably the waqf should be in accordance with the shares provided under Islamic inheritance law or equally in favour of sons and daughters.¹⁷⁹ Generally, jurists regard a waqf that was not in harmony with inheritance law as *makrūh* (disapproved) except where some children were more needy than the others.¹⁸⁰ As mentioned above, Syed Ahmad Khan's proposal for the protection of the estates of Muslim landed elites by the use of family awqāf was criticised by the 'ulamā' because of its ill intent to circumvent inheritance law. The primary objective of a waqf under Islamic law, according to them, was the wish to attain spiritual merits and not the

¹⁷⁸ Ibid 479.

¹⁷⁹ During the later days of Islam a family waqf was used to deprive females from their share in inheritance. The earliest mention of this problem in the *Fiqh* literature is found in the *Al-Mudawwana al-Kubrā* by Saḥnūn ibn Sa'īd (d. 179/795) where in the chapter of *ahbās* (pl. of *ḥabs* means waqf) one heading reads: 'the *ḥabs* for sons; exclusion of daughters; exclusion of some of them; and division of *ḥabs*'. It is stated that when 'Ā'isha, the wife of the Prophet, was told about this problem, she said that such was not the practice of the Companions of the Prophet. It is also mentioned that caliph 'Umar ibn 'Abdul 'Azīz (reigned 99/717 to 101/720) intended to revoke the *ṣadaqāt* (awqāf) of the people who had excluded females. The author of the *Mudawwana* noted that *ṣadaqāt* (awqāf) used to be in favour of both sons and daughters until people started to exclude daughters. Saḥnūn ibn Sa'īd, *Al-Mudawwana al-Kubrā* (4 of 5 vols, Aḥmad 'Abd al-Salām ed, Dār al-Kutub al-'Ilmiyya 1994) 423-24.

¹⁸⁰ Ibn Qudāma, *Al-Mughnī* ('Abd Allāh ibn 'Abd al-Muḥsin Turkī and 'Abd al-Fattāḥ Muḥammad Ḥulw eds, 8 of 15 vols, Dār 'Ālam al-Kutub 1999) 205-06. A *fatwā* of Mawlānā Ashraf Ali Thānwī, a leading scholar of famous Deoband seminary, dated 24 December 1925 regarded the family waqf as valid. He clarified that if it was established with the *mala fide* intention, it would be *makrūh* (disapproved) and if it was based on the concept that Islamic inheritance law was harmful, then it was irreligious. AA Thānwī, *Imdād ul Fatāwā* (2 of 5 vols, new edition, Maktaba Dār al-'ulūm 2010) 603.

protection of landed estates, which they saw as a root cause of so many evils such as lethargy.¹⁸¹

It was the progressive and enlightened Maulana Shibli Numani¹⁸² amongst the '*ulamā*' who undertook the task of uniting the '*ulamā*', both Shī'a and Sunnī, to support family awqāf. He contacted the renowned Muslim lawyers regarding this issue and organised a meeting of '*ulamā*' in Lucknow in November 1908. It was agreed in this meeting that *fatāwā* should be solicited from various '*ulamā*' in favour of family awqāf and an essay on such awqāf based on classical Islamic legal authorities must be produced. Shibli himself wrote the essay in which he refuted the arguments put forth in the judgment of the Privy Council.¹⁸³ Favourable *fatāwā* were also solicited from the leading Muslim scholars of Egypt in order to fortify the view of Indian '*ulamā*'.¹⁸⁴ A public fund was also established in order to finance the campaign for a declaratory Act.¹⁸⁵ Shibli also sent a letter to the Viceroy in November 1911 requesting that he receive a delegate of Muslims representing diverse sections of the Muslim community such as '*ulamā*', politicians and lawyers, who favoured Jinnah's Bill.¹⁸⁶ The majority of '*ulamā*' favoured such awqāf with the exception of those connected with the Ahl-e-Ḥadīth school, who argued that this type of waqf was

¹⁸¹ Hali (n 27) 180; Rashid (n 23) 133-34.

¹⁸² Z Umer, Maulana Shibli Numani: A Study of Islamic Modernism and Romanticism in India: 1882-1914 (DPhil Thesis, Oxford University 1969) 12-21.

¹⁸³ S Numani, *Maqālāt-i Shiblī* (1 of 8 vols, Ma'ārif 1954) 81-102.

¹⁸⁴ Abd al-Majīd, the head a Wakf Committee in London, procured *fatāwā* from the Grand Muftī of Egypt and the Qāḍī of Alexandria. See memorial from the President of Moslem Brotherhood of Progress, London to the Viceroy of India dated 29 December 1911. IOR/L/PJ/6/1079/1261.

¹⁸⁵ MSS Nadawī, *Ḥayāt e Shiblī* (2nd edn Ma'ārif Dār al-Muṣanifīn 1970) 538-48.

¹⁸⁶ *Ibid* 548.

invalid because of its inconsistency with inheritance law.¹⁸⁷

By this time, the issue of family awqāf had been amply discussed by various scholars and practitioners. Jinnah made use of the arguments presented in the scholarly material and referred to the favourable opinions of Wilson and Petheram. Jinnah emphasised that by the Privy Council decision ‘an important limb of the body of jurisprudence of Muhammadan law’ was cut off and regarded it as ‘a revolution in the law of property under Muhammadan Law’.¹⁸⁸ On 17 February 1913, Jinnah moved the motion that the bill be referred to a Select Committee, consisting of fifteen members. He mentioned that various criticisms and opinions have been received from different parts of the country and from different associations and leading men and proclaimed that the principles of the bill had been universally accepted by the Muslims of India.¹⁸⁹ Meanwhile, this Bill was given wide coverage in the press and diverse views were expressed by various sections of Indian society.¹⁹⁰

The Bill came under attack at the Select Committee level on the grounds of public policy with respect to creditors protection. Whereas the Hindu members required more effective measures against the fraudulent use of waqf, Muslim members criticised such measures as proposed under the Bill. Muslim members argued that since Muhammadan law did not require a waqf to be registered, no such

¹⁸⁷ Rahim, *The Principles of Muhammadan Jurisprudence* (Luzac & Co. 1911) 177.

¹⁸⁸ *PILC*, 1910-1912, IOR/V/9/36-38, 482-83.

¹⁸⁹ *PILC*, 1912-1914, IOR/V/9/38-40, 219.

¹⁹⁰ *The Times of India*, 18 March 1911 (introduction of Jinnah’s Bill at the Legislative Council); 16 June 1911 (a letter to the editor); 31 July 1911 (support of Anjuman-i-Islam Bombay for Jinnah’s Bill).

requirement should be imposed. Jinnah was convinced by their arguments and defended the removal of registration clauses from his Bill. He pointed out that family *awqāf* might be used to defraud creditors on two occasions: at the creation of a *waqf* and subsequently. He argued that both situations were accounted for as Muhammadan law safeguarded against the first and the Registration Act required that every *waqf* that was made in writing must be registered. He contended that Muhammadan law allowed the making of oral *waqf*, and any requirement of compelling Muslims to make *waqf* in writing was tantamount to over-ruling their personal law. However, he was quick to point out that an oral *waqf* was difficult to prove and therefore, people did not make oral *waqf*. He asserted that the requirement of registration over balanced against the consideration of infringing Muslim personal law. In order to rebut the criticism of the family *waqf* as a later development and an infringement of Islamic inheritance law, Jinnah made an interesting argument. He stated that the Hindus who were mostly the creditors must note that the oral *waqf* prejudiced Muslims to a greater extent by depreciating their titles to properties. But, he noted with regret that unfortunately despite this hazard Muslims were tied down by their law and could not alter it. Most interesting was the last part of his argument in which he asserted that this ‘difficulty’ of Muslims to be bound by their own stringent laws was no lesser than that of the government which had pledged by its Charters to administer Muhammadan law to the Muslims.¹⁹¹

Jinnah’s arguments were cleverly crafted and were meant to be convincing from the perspective of English legal reasoning. It was true that Islamic law allowed

¹⁹¹ *PILC*, 1912-1914, IOR/V/9/38-40, 336.

the making of oral waqf but Jinnah's eloquent arguments converted this permissibility into an imperative injunction of Islamic law. The registration of a waqf was proposed only to provide a safeguard and throughout Islamic history waqf deeds had been registered to achieve exactly the same end. However, Jinnah presented this requirement as an 'infringement' of sacred law. In the end, the requirement of the registration was removed from the Bill after the law member, Ali Imam, regarded it unnecessary. Speaking on behalf of the government, he stated that the restrictions which infringed the free observance of Muhammadan law and introduced a procedure of elaborate inquiry for which the Registration Department was not qualified, were not acceptable by the government.¹⁹²

The issue of family waqf conflicting with inheritance law involved some heated arguments amongst the members of the Imperial Legislative Council. One Muslim member from Bengal, Ghuznavi noted that the Bill was supported by the governments of Eastern Bengal and Assam, the North-West Frontier Province, Madras and the Punjab, while it was rejected by the Local governments of Bombay, the United Provinces and Bengal (before the modification of Lord Curzon's partition). He noted that the reason the Muslims of Eastern Bengal supported the Bill was because of the ruin suffered by the families of wealth and importance for being deprived of preservation of family properties under the family waqf. He noted that in Europe and particularly in England, family properties and prestige were preserved because of a primogeniture system and the law of entailment which provided an incentive to younger sons to build their own fortunes through exertion. Thus the

¹⁹² Ibid 222-23.

properties multiplied and fortunes increased while in India, because of constant splitting of properties, they disappeared from the hands of family members. He asserted that the inheritance law of Muslims was based on the *Qur'ān* and could not be materially interfered with. However, the family waqf, according to him, was a lawful mechanism within Muhammadan law. He also criticised the inclusion of stocks, shares and securities in the definition of property under the Bill, because they involved interest which is prohibited under Muhammadan law.¹⁹³

The above views were severely criticised by one Hindu member, Vijiaraghavachariar.¹⁹⁴ He argued that the opinion of the Privy Council was based on the careful consideration of Muslim law. The current law was a new law altogether and it was a fiction that the proposed waqf law was Muhammadan. He mentioned that there was a feeling amongst 'the advanced party of our Mussalman friends' that they should have the law of primogeniture. He narrated his discussion with one of his 'enlightened Mussalman friends', who told him that England was conquered by Angles, Saxons and others because of the law of primogeniture. He criticised the Muslims whom he described as 'an intensely religious community who believe that man has been created for the sake of religion'. He noted the paradox that the 'enlightened new leaders' of Muslims now wanted to have themselves protected from their own religion but 'in the name of their religion'.¹⁹⁵ He questioned Clause 3 of the Bill which provided that a Ḥanafī Mussalman could create a waqf for the repayment

¹⁹³ Ibid 219-21.

¹⁹⁴ He was one of the leading Hindu politicians and presided over the sessions of the Indian National Congress in 1920 and the All India Hindu Mahasabha in 1931. PR Rao, *The Great Indian Patriots* (2nd edn, Mittal Publications 1991) 194-98.

¹⁹⁵ *PILC*, 1912-1914, IOR/V/9/38-40, 340-42.

of his debts. However, he agreed with Jinnah that it was ‘self-acting’, and as the Muslims were ‘a commercial and a most enterprising people of India’, they were ‘most unlikely to impair and endanger their credit by abusing their powers as to creating wakf’ to defraud non-Muslim creditors. He also objected on the mechanism for reversing the judgment of the Privy Council through a piece of legislation rather than getting the judgment reversed.¹⁹⁶

Jinnah replied to this criticism by stating that the Privy Council had never in its history revised its decision. He explained that Clause 3 was in accordance with Muhammadan law and was necessary in order to remove the effect of the Privy Council decision. This decision regarded any dedication as invalid ‘if the dedication to charity is proposed to be given at any period too remote’. This prohibition stood even though under Ḥanafī law a waqf could be made for one’s own support, maintenance and payment of debts. As to creditors’ protection, he further clarified that secured creditors could not be affected by awqāf and a waqf by an insolvent person was invalid under Muhammadan law. He acknowledged the problem arising out of an orally created testamentary waqf. Such a waqf might not be given effect to by the heirs and in case a member of the family in the second or third generation might attempt to prove the oral waqf, no court might be ready to accept such a proof. He admitted that the danger remained and it was likely to affect Muslims a great deal more than any other community.¹⁹⁷ It could be noticed that Jinnah tactfully avoided

¹⁹⁶ Ibid.

¹⁹⁷ Ibid 346.

rebutting the criticism of family waqf on account of its conflict with Islamic inheritance law by simply stating that such waqf was valid under Ḥanafī law.

At the end of the debate, Ghuznavi raised the issue of giving the proposed Act a retrospective effect. However, it was explained to him by other members (whom he did not specify) that the Act was declaratory only and was not a new law. The Imperial Legislature was only providing that the waqf of the future or past had to be interpreted by the British and Indian judges according to the correct version.¹⁹⁸ It proved to be a wishful thinking. Future case law showed that not only did the courts refuse to give this Act a retrospective effect but they also regarded it as the primary source of waqf law along with the classical legal texts of *Fiqh*.¹⁹⁹ Despite the fact that the Bill was passed, officials were keen not to give any impression that the Privy Council made any error in interpreting Muhammadan law. Therefore, the preamble and the Statement of Objects and Reasons were carefully drafted.²⁰⁰

The passing of this Bill despite being economically inefficient was an appealing measure by the government for Muslims, especially for those in East Bengal, who were aggrieved after the partition of Bengal was abandoned by the

¹⁹⁸ Ibid 340.

¹⁹⁹ It was held that the Act does not regard family waqf as charitable. *Mst Ramzan v Mst Rahmani* 1932 AIR Oudh 71. The proposition that the Act restored pure Muslim Law as it existed centuries ago in Arabia was rejected in *Mahomed Afzal v Din Mahomed* [1947] AIR Lah 117, 130. The Privy Council gave the Act extremely restrictive construction. Thus a waqf in favour of slaves and adopted daughters was invalidated since slaves and adopted daughters did not fall within the family. *Ghulam Mohammad v Shaikh Ghulam Husain* (Allahabad) [1931] UKPC 113; *Riziki Binti Abdulla v Sharifa Binti Mohamed Bin Hemed* (Eastern Africa) [1962] UKPC 37.

²⁰⁰ Memos of Judicial and Public Department. IOR/L/PJ/6/1079/1261.

government in December 1911 as a result of immense Hindu political pressure.²⁰¹ The Bill also received the full support of Hindu members of the Council, except for one nationalist politician, Vijiaraghavachariar. They extended their full cooperation and did not want to stand in the way of their ‘Moslem brethren’. One Hindu member, Sachchidananda Sinha, supported Jinnah’s Bill and argued that neither economic considerations nor public policy should be a restraint in passing the Bill. Another member, Babu Bhupendranath Basu, supported the Bill but stated that effective measures should be taken to ensure creditors’ protection. Only one Hindu, Pandit Madan Mohan Malaviya was a member of the Select Committee. One Hindu member, Sita Nath Roy, wanted to introduce an amendment after the Select Committee report but withdrew it at the last moment.²⁰²

6. Anglo-Muhammadan Law: Symbiosis of Islamic Law and English Law?

One way to resolve the problem of the misuse of family awqāf could have been by regarding the nominal expenses for charitable and religious purposes as a charge on property and by regarding the property as a personal estate. This approach was adopted by the judges of the *Sadr Diwani Adalat* in four out of the seven family

²⁰¹ In 1905 Bengal was divided into East and West for better administration of the province. As a result of this partition, Muslims became a majority in East Bengal. But it adversely affected the interests of Hindu landlords, businessmen and professionals. Hindus portrayed this partition as part of the British policy of ‘divide and rule’. As a result of intense Hindu agitation, the government withdrew the partition in 1911. For details see RP Cronin, *British Policy and Administration in Bengal, 1905-1912: Partition and the New Province of Eastern Bengal and Assam* (Firma KLM 1977); Kozlowski (n 75) 189-90.

²⁰² *PILC*, 1912-1914, IOR/V/9/38-40, 339. Powers argues that in India family endowments contributed to sectarian strife between Muslims and their Hindu creditors. Powers (n 113) 570. However, this portrayal of Hindus as moneylenders and Muslims as debtors, despite having some historical evidence in its favour, is contested by Kozlowski on whose work Powers builds up his thesis. Kozlowski shows that Muslims also lent money on interest not only to Hindus but also to other Muslims. Kozlowski (n 75) 90.

awqāf cases.²⁰³ This view was followed by the Calcutta High Court in one decision in 1868.²⁰⁴ But two years later, the Calcutta High Court took an opposite view. The benefits drawn by the settlor and his family were regarded as a charge on the endowed property. It was presumed that these benefits were temporary and the property was eventually vested for religious and charitable purposes. In *Mazhrool Haq v Pubraj Ditary Mohapattar*, the court held:

We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family and for particular purposes, and which after they lapse will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law. A person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor, the main object of the Mahomedan law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now the poor are always with us, and therefore a man making an endowment and enjoying the profits during his lifetime, to go to the poor after his death, does not make the endowment for an uncertain or non-existent object.²⁰⁵

²⁰³ In *Khodabundha Khan v Oomutul Fatima* [1857] SDA 235, the testator had provided for the performance of certain religious acts after his death, and had further provided that after defraying the expenses thereof the surplus should belong to one Janee Khanum and after her death to the executor. There was no mention of the word waqf in the document. The court held that it was an absolute devise in favour of the executor, subject to certain trusts and the life-interest of Janee Khanum in the surplus profits. In *Khaja Surwar Hossein v Khaja Syed Hossein Khan* [1858] 14 SDA 1028, it was held that the party from whom the plaintiff in that case claimed the property held the property subject only to certain trusts, and it was not a waqf. In *Dalrymple v Khoondkar Azeezul Islam* [1858] 14 SDA 586, after noticing that the restriction of three years of lease of waqf property was not observed in India, it was held: 'But when the office of mutawullee is hereditary and the incumbent has a beneficial interest in the property, we look upon it as a *heritable estate burdened with certain trusts*, the proprietary right of which is vested in the mutawullee and his heirs...' (emphasis added). In *Mahomed Munnoo Chowdree v Hajra Beebee* [1858] 14 SDA 1218, there was apparently some interest for the family of the alleged endower. The court found that the plaintiffs do not style the land sued for by them waqf, of which the proprietary right has been relinquished, and which has been consecrated in such a manner to the service of God that it might be of benefit to men; that they assert that it was their heritable property, the profits being appropriated to the service of the *masjid*; in other words, that it was *an estate of inheritance charged with certain trusts*. (Emphasis added).

²⁰⁴ *Futtoo Bibee v Bhurrit Lall Bhukut* [1868] 10 WR 299.

²⁰⁵ [1870] 13 WR 235.

This decision was approved by the Privy Council in *Ahsanullah*.²⁰⁶ Later it was followed in *Deoki Prasad v Inait-ullah*.²⁰⁷ Prinsep J in *Bikani Mia* also adopted this reasoning, and held that the case law regarded any provision in support of the settlor or any member of his family as of subsidiary nature and constituting a ‘special charge of the proceeds of endowed land’.²⁰⁸ Justice Ameer Ali endorsed this solution in his dissenting opinion in *Bikani Mia*.²⁰⁹ As a result of these decisions, the remunerations and benefits of the *mutawallī* or beneficiaries could have been attached in order to pay their debts but the waqf property continued to be reserved for charitable and religious purposes.

However, in *Abdur Rahim v Narayan Das*, it was held that the dedicated property was not merely charged with trusts, rather it was ‘God’s acre’. Therefore, the waqf property was inalienable. This case established that the waqf property could not be attached even if parts of the property were for the benefit of family members.²¹⁰ This was in sharp contrast to the earlier decision rendered in *Pande Har Narain Ram v Surja Kunwari* where expenses of the idol were regarded as a charge over the waqf property.²¹¹

²⁰⁶ (Bengal) [1889] UKPC 56, 17 IA 28.

²⁰⁷ [1892] 14 All 375.

²⁰⁸ *Bikani Mia v Shuklal Parsad* ILR 20 Cal 116, 223-24.

²⁰⁹ *Ibid* 148.

²¹⁰ *Abdur Rahim v Narayan Das* (Bengal) [1922] UKPC 112, 50 IA 84.

²¹¹ (Allahabad) [1921] UKPC 30.

In *Abdur Rahim*, the suit was brought by the *mutawallī* of a mosque to recover possession of property from the defendants, whose title arose under encumbrances created by his predecessors in the office of the *mutawallī*. It was contended that the mortgagee should not be deprived of his money altogether which he lent to the *mutawallī* and was at least entitled to have a charge declared in his favour over the portion of the property, which was settled for the benefit of the settlor's family. However, this contention was rejected:

The property, in respect of which a wakf is created by the settlor, is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed "God's acre," and this is the basis of the settled rule that such property as is held in wakf is inalienable, except for the purposes of the wakf.²¹²

This might have been valid if the waqf property was made a mosque or was subjected to some other public service. But was it still valid if the waqf was a private/family settlement or a mixture of public and private types? The Privy Council in this case made it clear that the waqf property could not be severed into two distinct charges, one for the objectives of the waqf and the other for the personal use of the beneficiaries or *mutawallī*:

Their Lordships are of the opinion that, for an advance of money, *otherwise than to satisfy the legitimate needs and purposes of the wakf*, no part of the property held in wakf is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances the money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the wakf property itself.²¹³

²¹² (Bengal) [1922] UKPC 112, 50 IA 84, 90.

²¹³ Ibid 91 (emphasis added).

Earlier in *Bishen Chand Basawut v Syed Nadir Hossein*, a question was raised before the Privy Council about whether the trust created amounted to what in Muhammadan law was called a waqf, or whether it was merely a trust for the performance of religious duties? It was held that the margin of profits of the waqf property could be attached but not the waqf property in the hands of the trustee even though the trustee might draw marginal profits after the performance of all the religious duties. However, the corpus of the estate could not be sold, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee.²¹⁴ The rationale for this, in Lord Peacock's words was, that it might cause non-Muslims to perform Islamic rituals by becoming owners of the charged property. But in *Bikani Mia* a charge of Rupees 75 was allowed on waqf property by declaring the waqf invalid because it was a family waqf.²¹⁵

In one case decided by the Privy Council in the same year in which *Abdur Rahim* was decided, the family waqf was regarded as a charge upon the waqf property. In this case, an agreement was reached amongst the family members in 1881 that the waqf would continue and each member and their legal heirs would receive a specified amount. After the decision in *Abul Fata*, the *mutawallī* refused to pay according to the agreement by arguing that the family waqf was invalid. The Privy Council held that although the waqf was invalid for being a family waqf, the

²¹⁴ (Bengal) [1887] UKPC 45, 15 IA 1, 9.

²¹⁵ [1892] ILR 20 Cal 116.

agreement was to be performed and the allowances of the family members were regarded as a charge on the property.²¹⁶

This solution even if adopted would have been based on English law because the waqf under Islamic law could hardly be conceptualised as a charge upon property. The waqf was a perpetual arrangement and after the extinction of the beneficiaries of a private waqf the property was to be vested in the poor. This appears to be a purely theoretical description of waqf law. In practice it was difficult to imagine that a family waqf could have lasted more than three or four generations because of increase in the number of beneficiaries and consequent fragmentation of their interests. In the absence of the registration of the deed of waqf and a close supervision by the court, the waqf could hardly be kept operational. The emergence of perpetual leases of waqf property during the later period of the history of waqf was a reflection of the underlying dynamics that ran against the theoretical constructs of waqf law.

The family waqf could have been regarded as a settlement. An assertion was made in many cases that the family waqf should be regarded as a settlement of life estate for the beneficiaries. However, this proposition faced a problem. The Privy Council in its decision in 1872 held that life estates were not recognised under Muhammadan law.²¹⁷ But as English law allowed life estates, it was argued that family waqf should be treated as a settlement. This argument was not raised in any

²¹⁶ *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153. This judgment was confirmed in *Nawab Khajeh Habibullah Saheb v Raja Janaki Nath Roy* (Bengal) [1929] UKPC 98.

²¹⁷ *Mussamut Humeeda v Mussamut Budlun* (Bengal) [1872] UKPC 33, 17 Cal WR Civ Rul 525.

case before the Privy Council. But it was raised in the Bombay High Court before Beaman J who was an experienced judge. He had started his career from the lower courts and was gradually elevated to the High Court.²¹⁸ He accepted that in certain cases, the courts attempted to ‘expand the rigid rules and principles of archaic systems of oriental law to meet the requirements of a rapidly growing, progressive and developing society.’²¹⁹ However, he found it extremely hard to reconcile the ‘most complex and artificial products of advanced civilized jurisprudence’ with the ‘extremely crude and simple notions of primitive people’.²²⁰ He doubted whether private trusts could be known to Muhammadan law and he was sure that ‘the early Mahomedan law-givers had not the faintest conception’ of a settlement.²²¹

Beaman J was praised for his grasp of law and intellectual strength. This was more remarkable because he could hardly read any document because of his very poor eyesight. But this physical disability did not hinder him from the performance of his duties as a judge, rather his judgments were praised for their intellectual prowess and exhaustiveness.²²² In another case regarding gifts and private trusts of the wealthy *Khojah* Community of Bombay, Beaman J made the following observation regarding application of Muhammadan law by the English Courts:

²¹⁸ Vachha (n 142) 91-93.

²¹⁹ *Jainabai v R. D. Sethna* [1910] 24 ILR Bom 604, 613-14.

²²⁰ *Ibid* 614.

²²¹ *Ibid* 616-17.

²²² Vachha (n 142) 92.

The English Courts are constantly making Mahomedan Law for themselves and engrafting upon the extremely crude and primitive notions of the early Mahomedan lawyers, the artificial conceptions of the English law and so endeavouring to mould and shape the whole into a somewhat practical form, which while it may flatter the conservative prejudices of good Moslems, does not in the least resemble anything which the authors of the Moslem Law had themselves laid down; but is rather an attempted compromise between the rigidity and inadequacy of the legal notions of a people then living under very primitive social conditions with their now highly complex social needs and requirements.²²³

He expressed his frustration in attempting to apply the advanced principles of English law on primitive Muhammadan law in the following words:

This attempt to engraft the whole of our artificial system of trusts and settlements upon the Mahomedan Law has super-induced such a hopeless confusion of thought and misuse of language that I believe it now to be quite impossible to avoid, endeavoring to administer the Mahomedan Law on this subject [waqf], coming into conflict on the one hand with the standard authorities and on the other with the reported cases...²²⁴

This judgment shows that the judges of the Indian High Courts were conscious that they were creating an altogether new legal system. They also knew that the principles of this new legal system were diverging from the 'standard authorities' of Muhammadan law. They could see a clear difference between what they called the standard principles of Muhammadan law and the principles laid down in case law. The latter was the creation of their own work.

Faiz Badruddin Tyabji, who was representing one of the parties in this case, contested these negative views about Muhammadan law. To him Beaman J replied:

²²³ *Casamally Jairajbhoy Peerbhoy v Sir Currimbhoy Ebrahim Bart* [1911] ILR 26 Bom 214, 249.

²²⁴ *Ibid* 253.

It has been strenuously contended on behalf of the defendants by Mr. Tyabji that all these highly artificial notions of the English law were well known to and fully developed by the subtle intellects of the Moslem Law schools during the height of Moslem intellectual powers in the early middle ages, and he points to a rare allusion here and there to the doctrine of Amanat or trust. But that is a misuse of the word, if it is intended to be synonymous with our extraordinarily elaborate and artificial law of trust. It is perfectly true that in simple instances, Moslem lawyers recognize a fiduciary relation, as in the case of a bailee or the father of a minor receiving property for the use of his child. Further than that I am unable to see that they ever went or intended to go... I do not believe the English notion of trusts had any counterpart whatever in the brains of any Mahomedan lawyer or text book writer or that it could have been applied as it is applied, in England in making voluntary settlements to the Mahomedan law of gift inter vivos. For, if we take the actual cases... there could have been no possible delivery of seisin in favour of those who took, remoter estates.²²⁵

These were the frank and candid observations of one of the experienced judges of the Indian High Courts, which showed that not only did judges have to construct the so called Muhammadan law for their own use in the courts, they also had to adopt it to the changing circumstances of society by having recourse to the ‘modern and civilised jurisprudence of English law’. However, they found this task extremely hard because of constant conflict between one primitive and the other advanced legal system.²²⁶ These views were in sharp contrast to those of Sir William Hay Macnaghten, registrar of the *Sadr Diwani Adalat* and the author of a monumental work, the *Principles and Precedents of Moohummudan Law*. This was the first book which presented Islamic law in the form of precedents and was used as a handbook for judges and lawyers. He was an admirer of Islamic law and found its principles in conformity with the principles of natural justice and not very dissimilar to Roman law, civil law or English

²²⁵ Ibid 254-55.

²²⁶ Beaman J expressed similar views extra-judicially in his comments on the Mussalman Wakf Validating Bill. He argued that Muhammadan law did not contemplate Trusts, or settlements, or other forms of gift *in futuro*. ‘Out of respect for Mohammadan religious feelings, we have consistently upheld their own law and applied it as best our Courts have been able, in all civil disputes between Mohommadans.’ IOR/L/PJ/6/1079.

law. He gave many examples from the law of gifts, bailment and pledge to support this argument.²²⁷

Tyabji furnished a detailed reply to the above assertions of Beaman J in the next edition of his *Muhammadan Law*. He acknowledged the influence of English law on Muhammadan law by its application in courts, but clarified that the assumption that Muhammadan law was incapable of expansion and development would be dangerous for the Muslim community. He rebutted the argument of absolute rigidity of Muhammadan law by pointing out that legal expansion was not limited to English law only, and asserted that Muhammadan law was capable of development under the doctrine of *istihsān* (juristic preference) and *istiṣlāḥ* (public interest) and by the *fatāwā* of a *qāḍī*. Finally, he clarified that the complaint of English judges about the difficulties of Muhammadan law because of its inconsistency arose out of their unfamiliarity with the Arabic language and the ways and lives of the natives whose conduct the courts tried to govern. He asserted that the charge of inconsistency and unintelligibility against Muhammadan law was due to the fact that it was studied only in the form of translation, and that translation was also limited to its fragments. Therefore, the English judges failed to form a holistic view of Islamic law.²²⁸

²²⁷ Macnaghten (n 36) lvii.

²²⁸ Tyabji, *Muhammadan Law* (3rd edn, N. M. Tripathi 1940) 84-87. Tyabji's daughter, Kamila Tyabji, later wrote a treatise on limited interests in Islamic law. K Tyabji, *Limited Interests in Muhammadan Law* (Stevens 1949). She was an Oxford law graduate from St. Hugh College and a barrister. She was the first Muslim woman who went to Oxford University. She was also the first woman to argue a case before the Privy Council. N Khan, 'Obituary, Kamila Tyabji' *The Guardian* (15 June 2004) <http://www.guardian.co.uk/news/2004/jun/15/guardianobituaries.india> accessed 5 January 2013. On the achievements of Tyabji family see J Theodore P. Wright, 'Muslim Kinship and Modernization: The Tyabji Clan of Bombay' in I Ahmad (ed) *Family, Kinship and Marriage among Muslims in India* (Manohar Book Service 1976) 217-38.

This judicial attitude towards Islamic law was reflected in various judgments of the Privy Council. On the issue of a testator's conferring of power of appointment under his will, the Privy Council refused to accept an analogy with a case decided under Hindu law, wherein such power was held valid in the absence of any public inconvenience, or prohibition under Hindu law. It was held:

Their Lordships have not been referred to, and are not aware of, any work on Mahomedan law, or any judicial decision in support of the view that powers of appointment, so special a feature in English law, are recognized in Muslim law. The matter seems to have never been discussed. In such circumstances, and at this date, to add to the testamentary capacity of Muslims the right to create powers of appointment might seem to encroach on the sphere of the legislature.²²⁹

The Privy Council decision in *Abul Fata* and the subsequent campaign by Muslims to get it reversed presented a great opportunity for convergence between traditional Islamic law and the policy considerations of English law. A compromise might have settled between the two extremes as was suggested by Sir Raymond West with his experience in the Indian legal system spanning over half a century. The burden for this lack of convergence in an area of law which dealt with secular affairs of Muslims and which was not entirely based on religious texts can not be placed solely on the shoulders of British judges such as Beaman. Rather the vested interests of Muslim elites were as much a conservative force. Beverley argues that resistance by Muslim legal commentators such as Ameer Ali and Faiz Tyabji was instrumental in challenging the interpretative authority of English judges.²³⁰ This observation is true

²²⁹ *Sardar Nawazish Ali Khan v Sardar Ali Raza Khan* (Oudh) [1948] UKPC 8, 75 IA 62, 76.

²³⁰ EL Beverley, 'Property, Authority and Personal Law: Waqf in Colonial South Asia' (2011) 31 South Asia Research 155.

to a certain extent, but it does not explain the fact of why this resistance was limited to family awqāf only. Both Ameer Ali and Faiz Tyabji along with other Muslim judges and legal commentators provided a critique of the decisions of English judges on various other issues related to Muslim Personal law.²³¹ But the reaction to the decision in *Abul Fata* was unprecedented.

It is interesting to note that the leading proponent of family awqāf, Justice Ameer Ali had initially opposed Syed Ahmed Khan's Bill, which proposed the use of family awqāf for the protection of estates of Muslim landed elites on two grounds. First, it was contrary to the injunctions of *Sharī'a*; and second, it would allow 'perpetuities of the worst sort'.²³² However, later he became a vehement supporter of family awqāf. In his legal treatises and judgments, Ameer Ali appeared esoteric and tried to prove the validity of such endowments through his profound knowledge of classical legal texts and a deep understanding of Islamic legal and political history. However, in his articles and talks addressed to the general public he was candid to point out that the family waqf had a crucial function, because an unqualified application of Islamic inheritance law would lead to the 'absolute pauperisation' of Muslim families. He pointed out that the family waqf inhibits disintegration of family

²³¹ After regarding family estates as invalid in its decision in 1872 (n 216), the Privy Council in its subsequent decision held a life estate in favour of a wife as valid. *Amjad Khan v Ashraf Khan* (Oudh) [1929] UKPC 21, 56 IA 213. Tyabji claimed this as a vindication of his claim and devoted a separate section to this issue in his treatise. Tyabji, FB, *Muhammadan Law* (3rd edn, N. M. Tripathi 1940) v-vi, 487-529.

²³² This is based on a letter of Ameer Ali dated 1880. Kozlowski (n 75) 162.

property by protecting it from moneylenders.²³³ Thus protection of family property was the primary motive for his support of family awqāf.

7. Conclusion: Unsuccessful Convergence

The treatment of private awqāf under the English legal system presents a phenomenal example of the clash between Islamic and English legal traditions. From the perspective of convergence, it was a missed opportunity to transplant the policy considerations of English law into Islamic law.²³⁴ It is easy to depict this story as a conflict between the values of religious-based ‘static’ Islamic law and ‘flexible’ policy oriented English law. However, underneath this conflict lay such diverse factors as material interests, personal inclinations, ideologies and politics. It was not hard to deal with the problems posed by family awqāf within the parameters of Islamic law by clarifying the rules against their fraudulent use and by requiring their registration and supervision by courts. These mechanisms had worked throughout the

²³³ SR Wasti (ed), *Memoirs and Other Writings of Syed Ameer Ali* (People's Publishing House 1968) 228-31. *The Times of India* December 3, 1904. Ameer Ali's Presidential Address to the All-India Muhammadan Educational Conference in 1899 reproduced in SA Ali and S Muhammad, *The Right Hon'ble Syed Ameer Ali: Political Writings* (South Asia Books 1989) 166-67.

²³⁴ It did not take long for legal commentators to realise the ill effects of perpetuities, described as ‘the vicious system of perpetual family settlements’ by Kamila Tyabji and proposals were made to limit the period of family waqf by following such developments in the Arab world. Tyabji, *Limited Interests in Muhammadan Law* (n 226) 198-99. F. B. Tyabji also highlighted the negative impact of family endowments which ‘fetter and clog’ properties without much benefit. FB Tyabji, *Muhammadan Law* (n 26) vi. In a similar vein, Fyzee noted the adverse consequences of family awqāf and lamented the fact that the Privy Council judgment in *Abul Fata* was reversed. Fyzee, *Outlines of Muhammadan Law* (3rd edn OUP 1964) 267-68. First edition, 233-34. Fourth edition, 277-78. Fifth edition, 226. He regarded family endowments as a cause of lethargy, nepotism and litigiousness in the Muslim community and regretted that despite the ‘wails of the orthodox Muslims’, the Privy Council judgment might have proved useful for Islamic property law in India. AAA Fyzee, 'The Impact of English Law on the Shariat in India' (1962) 18 *Revue Egyptienne de Droit International* 1, 16.

history of awqāf all over the Muslim world.²³⁵ But the waqf did not fit within the English legal system. In fact, no such attempt was actually made due to the scepticism of many Muslim judges on the one hand and the arrogance of some British judges on the other. Muslim jurists such as Ameer Ali and Tyabji were infused with the superiority of *Fiqh*, which they considered had attained a level of maturity such that it provided solutions to all problems and could still respond to modern challenges under the doctrines of *istihsān* (juristic preference), *maṣlaḥa* (public interest/good) and *darūra* (expediency or necessity).²³⁶ Interestingly, none of these principles was invoked in this particular debate because they could support the policy consideration behind the rule against perpetuities.²³⁷ It was under these principles that family awqāf were restricted to two generations or sixty years from the date of the founder's death in Egypt in 1946 and were eventually abolished in 1952. Similar developments took place in Syria and Lebanon.²³⁸ The views of Ameer Ali and Tyabji were in sharp

²³⁵ OH Effendi, *A Treatise on the Laws of Evqaf* (C. R. Tyser and D. G. Demetriades tr, The Government Printing Office 1899); OH Effendi, *A Gift to Posterity on the Laws of Evqaf* (C. R. Tyser and D. G. Demetriades tr, Government Printing Office, Nicosia 1922).

²³⁶ This could also be interpreted as a defence mechanism against the onslaught of Western cultural values. Ameer Ali expressed these views in detail in his two books. SA Ali, *The Spirit of Islam or the Life and Teachings of Mohammed* (First published 1891, S.K. Lahiri & Co. 1902); SA Ali, *A Short History of the Saracens* (Macmillan 1899).

²³⁷ An analysis of the *fatāwā* issued by the influential Muslim institution, Dārul 'Ulūm Deoband during this period shows that religious scholars interpreted *Fiqh* with the 'assumption that the letter of the law was more important than the application of general principles such as expediency and the public good'. MK Mas'ud, Trends in the Interpretation of Islamic Law in the Fatāwā Literature of Deoband School (M.A Thesis, McGill University 1969) 80. This was in sharp contrast to the early history of *Fiqh*. Recent studies on the development of *Fiqh* in its early period show that the doctrine of *maṣlaḥa* played an important role in both adapting and extending *Fiqh* with the changing social practices and circumstances. FMM Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Brill 2010) 349-53. In post colonial period, a recourse to these principles was made in order to affect legal changes. F Rahman, 'A Survey of Modernization of Muslim Family Law' (1980) 11 International Journal of Middle East Studies 451.

²³⁸ Law No. 48 of June 12, 1946; Law No. 180 of September 1952. H Cattān, 'The Law of Waqf' in M Khadduri and HJ Liebesny (eds), *Law in the Middle East* (The Middle East Institute 1955) 218-22; Muḥammad Qadrī Bāshā, *Qānūn al-'adl wa-al-inṣāf lil-qaḍā' 'alā mushkilāt al-awqāf* (first published in 1893, Dār al-Salām 2006) 118-21. The legal changes in Lebanon were justified by reference to principles in various schools of Islamic law. It showed that changes could be made in waqf law within

contrast to the realities of the world. For instance, one of the leading supporters of the family waqf, Nawab Ahsanullah and his father Abdul Gani, used the Privy Council decisions in order to cancel their family waqf, which was found to have limited their powers to control family property.²³⁹ Their family waqf was subjected to litigation at multiple times and thrice the appeals reached all the way to the Privy Council.²⁴⁰ However, the family waqf as an instrument to circumvent inheritance law and to provide protection against creditors could no more be used, as a waqf of immovable property exceeding Rupees 100 was required to be registered under the Indian Registration Act 1908. Moreover, even after the passing of the Wakf Validating Act 1913 and another Act giving it retrospective effect in 1930, courts kept on giving strict interpretation to these ‘legislative innovations’, mostly to discourage such awqāf.²⁴¹ The existence of family waqf devalued the properties and restricted the discretion of family members to use them efficiently. The financial advantages of family awqāf also diminished because the income arising out of family awqāf did not remain tax free.²⁴² The central and provincial legislatures passed statutes in 1920s and 1930s requiring registration of awqāf and imposing a system of supervision, which also extended to family awqāf.²⁴³ These changes started the process of a slow but sure

the principles of *Shari‘a*. Muḥammad Ja‘far Shams al-Dīn, *al-Waqf wa aḥkāmuhu fī al-fiqh al-Islāmī wa al-qawānīn al-Lubnāniyya: dirāsa muqārana* (Dār al-Hādī 2005).

²³⁹ *Khajeh Soleman v Nawab Salimullah Bahadur* (Bengal) [1922] UKPC 23, 49 IA 153.

²⁴⁰ *Ibid*; *Nawab Khajeh Habibullah Saheb v Raja Janaki Nath Roy* (Bengal) [1929] UKPC 98; *The Honourable Nawab Habibula v The Commissioner of Income-tax, Bengal* (Bengal) [1942] UKPC 34.

²⁴¹ Pound calls this ‘the orthodox common law attitude’ towards legislation. R Pound, ‘Common Law and Legislation’ (1908) 21 *Harvard Law Review* 383, 385.

²⁴² *Umar Baksh v Commissioner of Income Tax* ILR 12 Lah 725, AIR 1931 Lah 578 (SB).

²⁴³ The Statement of Objects and Reasons of the Mussalman Waqfs Registration Bill 1921 described the misuse of family waqf to defeat creditors and evade the law along with harnessing *mutawallīs* who

death of family awqāf in India.²⁴⁴ This process continued after the independence of India. In addition to tax laws, new laws regarding land reforms and administration of evacuee properties also reduced the number of family awqāf especially those comprising agricultural lands.²⁴⁵

The family waqf controversy brought the issue of Islamic law and awqāf to the mainstream of public debate. This had an impact on the governance structure of public awqāf. Not only did the Wakf Validating Act 1913 become one of the primary sources of waqf law, it also opened up the way for further legislation. This time for the better management and supervision of public awqāf. Later private awqāf were also included in the mandatory supervisory structure because notionally a charitable element could be found in every family waqf. Secondly, the Wakf Validating Act politicised Islamic law. Muslim politicians grabbed the opportunity to unite the divergent groups of Muslims on one platform. Finally, the passing of this Act gave the Muslims of India a new confidence and paved the way for the passing of further legislation favourable to Islamic law. For instance, the Muslim Personal Law (Shariat) Application Act 1937 abolished customs, especially those that deprived females of their share in inheritance. Under this Act, Islamic inheritance law regulated succession, but the Act did not apply to agricultural lands because only provincial

by their 'moral delinquencies, bring discredit not merely on the endowment but on the community itself'. IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

²⁴⁴ By making a comparison with the treatment of family endowments in Algeria under French rule, Powers argues that it was a 'liberalizing tendency in British rule' that the legislative process was used to protect family endowments against court decisions, rather than to dismantle them as happened in colonial Algeria. Powers (n 113) 563. This observation is based on a limited analysis of a small number of cases mentioned in Kozlowski's book.

²⁴⁵ Rashid (n 23) 138-47.

legislatures could enact laws regarding agricultural lands according to the constitutional scheme introduced under the Government of India Act 1935.²⁴⁶

The next two chapters will show that if vested interests and politics proved to be a hindrance to the convergence on family awqāf, positive developments did take place in waqf law in British India. In this respect both legislation and adjudication played a vital role for the development of governance structure for awqāf and for the formulation of new principles to accommodate changing circumstances.

The main finding in this chapter is that the policy considerations in favour of creditors' protection and market circulation of land were the primary reasons behind the Privy Council decision invalidating family awqāf. But why was the Privy Council so concerned about these issues, while the legislature did nothing about them and even went on to reverse the decision of the Privy Council? The case law discussed above along with the related material does not provide any answer to this important question. Neither Kozlowski nor any other researcher has tried to answer this question. In order to solve this puzzle, we need to explore the role of the judiciary in the colonial state. As many researchers have noted, adjudication was an important mechanism of law making in British India alongside the whole project of codification by legislation. The next chapter on the regulatory framework of awqāf shows that law making through courts was preferred by the colonial administrators because of its flexibility. The courts in British India were not merely the adjudicators of legal

²⁴⁶ Jinnah played an important role in the passing of this Act by participating in the legislative debates as a member of the Indian Legislative Assembly. *PILC*, IOR/9/140-145. G Minault, 'Women, Legal Reform and Muslim Identity' in M Hasan (ed) *Islam, Communities and the Nation: Muslim Identities in South Asia and Beyond* (University Press Limited 1998) 152-53.

disputes they played the important function of developing the law, suitable to the circumstances in colonial India.

Chapter 3

Regulatory Framework for Awqāf in British India

1. Introduction

The previous chapter raised the question why the British Indian courts and the Privy Council, rather than the legislature, adopted an aggressive attitude towards the family waqf on account of its violating the rule against perpetuities. An answer to this question can be found in the history of statutes which were enacted to regulate awqāf. The officials of the East India Company took over the control of religious endowments as the successors of the old regimes. Official supervision of such endowments was one of the functions of state in pre-colonial India. But the supervision of Muslim religious institutions by Christian officers of the Company was inappropriate because it offended the religious susceptibilities of not only Muslim subjects but also of Christian officials. Therefore, official control was gradually withdrawn and replaced with judicial control whereby judges resolved disputes relating to endowments. Judges could also draw a scheme of management in appropriate cases. But they did not administer endowments. This led to wide scale corruption and misappropriation of endowment funds by their trustees. Therefore, several legislative proposals were put forward in order to provide better state supervision of endowments. However, the government resisted for more than half a century any change in its policy that would entail reverting to executive control. This is because judicial control was regarded as more flexible. At the policy level, law making by courts was preferred because it helped gauge public reaction. The final

decision, unlike a statute, did not appear at once. Further, it did not directly affect a large number of people as was the case with a statute.

This chapter explores the history of the regulatory framework for awqāf in British India. From an English law perspective, a typical waqf was a strange mixture of paradoxical features. Legal experts in India spent much time and energy in distinguishing the conflicting elements in awqāf. The classification of awqāf, either as secular or religious and public or private, was at the heart of debates regarding their regulation by the state. Since huge lands were vested in awqāf, the officials of the East India Company could hardly ignore them. Therefore, after its full assumption of charge as the *dīwān* or tax collector of Bengal, Bihar and Orissa, Company officials launched a survey of lands held in charity in the capital of Bengal, Dacca. This survey, conducted in 1774, caused panic amongst the rent-free holders. This measure was regarded as ‘impolitic’ by the Court of Directors of the East India Company. They described the resumption of rent-free lands as a very serious issue because it ‘materially affects the property and prejudices’ of the people and urged the local government ‘to proceed with every degree of caution’.¹ This survey was followed by gradual resumption proceedings in order to recover lands held as rent-free grants. These included a large number of awqāf. The resumption process was augmented with the increase in the political power of the Company as a result of wars, which required more finances. The largest source of finance for the Company was land

¹ Despatch to Bengal, 19 May 1790, vol 20, para 32 referred in AM Waheeduzzaman, 'Land Resumption in Bengal, 1819-1846' (PhD Thesis, University of London 1969) 25.

revenue. In Bengal, the financially pressed government used the excuse of the misuse of endowed funds to resume lands attached to mosques and *madāris*.²

The Company acquired the administration of awqāf under the 1810 Bengal Regulation, which was extended to Madras in 1817. However, the administration of the religious institutions of Muslims by Company officials was not a very sensible policy. Therefore, Company officials started to divest the control of religious awqāf within a few decades of their taking charge. This was formalized under the Religious Endowments Act 1863, which transformed the administrative control of awqāf into judicial control. However, a lack of official supervision caused large-scale mismanagement of waqf funds and even alienation of waqf properties by their managers. The absence of centralized administration also meant that the waqf funds remained in the hands of local managers and the surplus funds could not efficiently be utilized for the benefit of the Muslim community, for example, for educational purposes.

This led Muslim leaders, especially the politicians, to require the government to provide effective control and supervision of awqāf. However, the government was not ready to depart from its policy of non-intervention in religious endowments by its officials. But the courts kept on deciding disputes over endowments including mismanagement of their funds. These disputes included cases of inter-communal

² Ibid 234-5 and 454-55.

strife³ and also cases of struggle for the control of endowments within the Muslim community.⁴ While rejecting a dozen legislative proposals on the administration of Hindu and Muslim endowments, the government tried to facilitate the judicial control of endowments by decreasing the cost of litigation, increasing the powers of judges and removing cumbersome procedures. This did not stop agitation for legal reform for the provision of effective state supervision of endowments. Both Hindu and Muslim politicians were united on this point and pressed the government to pass a law on this issue.

This showed the failure of judicial control. The courts failed to curb wide scale corruption in endowments because of their cumbrous procedures, delays and costs. But it also revealed the failure of self-governance and rifts within the native communities. The reaction of indigenous communities was marred by rational apathy as none other than the materially interested parties took the issue of mismanagement of awqāf to the courts and followed it to appellate levels. A few organisations were formed for collective action to provide communal supervision of awqāf but they did not achieve much success. The British officials realized that it was the educated and progressive Indians who wanted state control of endowments, which were in the hands of conservative religious class.⁵ The officials believed that the former were a

³ *The Mosque known as Masjid Shahid Ganj v Shiromani Gurdwara Parbandhak Committee, Amritsar* (Lahore) [1940] UKPC 21 (This case involved a dispute between Muslims and Sikhs over an ancient mosque).

⁴ *Fazl Karim v Maula Baksh* (Bengal) [1891] UKPC 13, ILR 18 Cal, PC 448. (This case was for the removal of an *imām* of a mosque for his adopting different practice of prayers).

⁵ One Muslim member of the Bombay Legislative Council regarded the *mutawallīs* of endowments as ‘penniless beggars’ who even disposed of mosques when they were hard pressed for money. Extracts from the Official Report of the Bombay Legislative Council Debates dated 15 March 1924, 1414.

small minority and did not want to offend the latter who enjoyed the support of the majority. In fact, the religious men such as *pīr* (ṣūfī master) and *sajjādanashīn* (spiritual leader) were important intermediaries who were relied upon by the government for the control of masses.

The government yielded to the persistent pressure for legal reforms after resisting it for more than half a century by segmenting the laws at provincial and communal levels. At the central level, a statute providing general principles was passed in 1920 and each provincial legislature was enabled to pass its own law on this issue. Both Hindus and Muslims opted to have separate legislation concerning their endowments.

2. Management of Awqāf under Islamic law

There was no uniform structure for the internal governance of awqāf under *Fiqh* (classical Islamic law). The waqf deeds usually provided the mechanism for succession of *mutawallī* along with the portion of property to be spent for different purposes. For instance, in the waqf deed of Dewan Nabi Nawaz Khan dated 19 September 1862, his wife and daughter were allocated a fixed monthly allowance of Rupees 50 and Rupees 100 each respectively. Rupees 50 were to be spent on a *madrassa*. The wife was to receive her share until her death while the allowance of his daughter was to go to her descendants perpetually. Neither had any right in the *zamindari* (landed estate). After the death of his son, the ‘chief amongst his

Similar views were expressed by one member from Madras regarding Hindu *mahants*. *PILC*, dated 3 Sep 1919, IOR/L/PJ/6/1627, File 6265: Sep 1919-Jul 1920.

descendants' was to be the *mutawallī*.⁶ The deed did not provide any governance mechanism nor did it mention any thing in case the value of the property might fluctuate. In case of such absences, one might expect that *Fiqh* provided the default rules to fill the gap left by the settlor. Customary practices or usages supplemented *Fiqh*. For instance, in the Punjab most religious endowments were governed by customary practices.⁷

Under classical Islamic law, the ruling authority and the *qāḍī* played a key role in both the internal and external management of awqāf. For instance, *Fiqh* texts envisage that the founder lays down a procedure for the appointment of one or more *mutawallī* to administer the waqf according to the terms and conditions of the waqf deed.⁸ He/she could do this either by specifying the names like A, B and C or conditions like the wisest, the eldest or the most knowledgeable person amongst the family or community. However, if the founder did not appoint a *mutawallī*, the *qāḍī* is to appoint one according to the Mālikīs and Shāfi'īs.⁹ The Ḥanafī view is that, in such cases, the founder is the *mutawallī* himself/herself¹⁰ whether he made this a condition

⁶ The waqf deed reproduced in Report of the Muhammadan Educational Endowments Committee (BS Press Calcutta 1888) xx.

⁷ C Boulnois and WH Rattigan, Notes on Customary Law as administered in the Courts of the Punjab (William Clowes and Sons 1878) 134-40; HAB Rattigan, A Digest of Civil Law for the Punjab Chiefly based on the Customary Law (7th edn, Wildy and Sons 1909) 148-157.

⁸ Another expression used for a *mutawallī* is '*qaiyyam*'. This is the simplest form of a waqf. In other cases a *nāẓir* (accountant) might be appointed by either the settlor or the *qāḍī* to keep an eye on the accounts of the waqf. Ibn 'Ābidīn, *Radd al-muḥtār 'alā al-Durr al-mukhtār sharḥ Tanwīr al-absār* ('Ādil Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Mu'awwaḍ eds, 6 of 14 vols, Dār al-Kutub al-'Ilmiyya 2003) 683.

⁹ MAZYISE Nawawī, Minhaj Et Talibin: A Manual of Muhammadan Law according to the School of Shafii translated into English from French edition of L.W. C. Van Den Berg by E. C. Howard (W. Thacker & Co. 1914) 233.

¹⁰ This is the view of Abū Yūsuf. According to Muḥammad al-Shaybānī, however, the waqf is invalid in this case. The reason for this difference is that the former does not require the transfer of property as

or not in the waqf deed. After his death the appointment would be according to his will, if such a will is made, and in its absence the ruler is to appoint a *mutawallī*.¹¹ Secondly, a *qāḍī* is to supervise in order to ensure that the valid conditions of a waqf deed are properly enforced, and where a deviation is required in order to make effective use of waqf properties, permission of a *qāḍī* is mandatory. For example, where a stipulation is made that the waqf property should not be rented for more than one year and it is beneficial to enter into a long-term lease.¹² In this case the *mutawallī* is required to apply for the permission of the *qāḍī* before entering into a lease extending beyond one year.¹³

The ruler could also remove a *mutawallī* through the court, though he might be the founder, should he become incapable or fail to perform his duties or be guilty of misconduct.¹⁴ British Indian Courts applied this rule in the late eighteenth century.¹⁵

the necessary requirement for the validity of waqf as against the latter who requires it. Al-Shaykh Niẓām, *Fatāwā al-‘Ālamgīriyya* (2 of 4 vols, Nawal Kishawr 1865) 996.

¹¹ The Ḥanbalīs agree with the Ḥanafīs that the ruler will appoint a *mutawallī* in case the beneficiaries are unspecified like the poor or ‘*ulamā*’ or *mujāhadīn* (warriors) or *madrassa* (school) or mosque. However, if the beneficiaries are specified then every beneficiary is *mutawallī* to the extent of his share as Ḥanbalīs regard the beneficiaries to be the owners of waqf properties. Ibn Qudāma, *Al-Mughnī* (‘Abd Allāh ibn ‘Abd al-Muḥsin Turkī and ‘Abd al-Fattāḥ Muḥammad Ḥulw eds, 8 of 15 vols, Dār ‘Ālam al-Kutub 1999) 237.

¹² W Al-Zuhaylī, *Al-Fiqh al-islāmī wa adillatuhu* (10 of 11 vols, Dār al-Fikr 2004) 7688. Such conditions were normally laid down in the waqf deeds in order to avoid expropriation of waqf properties by a lessee.

¹³ Al-Kindī records that the *qāḍī* diligently ensured that the waqf properties were properly maintained and some of them personally supervised the maintenance. In case the manager was found negligent in maintaining the property, he was punished with lashes. Muḥammad ibn Yūsuf Kindī, *The Governors and Judges of Egypt, or, Kitāb el ‘umarā’ (El wulāh) wa Kitāb el Quḍāh of El Kindī* (Brill 1912) 394-95 and 384.

¹⁴ If there is more than one *mutawallī* of a waqf, they are jointly liable. In case some of them embezzle, all of them will be removed from their offices. This was the opinion of Abū Su‘ūd, the great Shaykh ul Islām of the Ottoman Empire during the sixteenth century. Ibn ‘Ābidīn (n 8) 578.

A declaratory clause was added in the 1810 Bengal Regulation in order to empower the government to remove a curator who committed breach of trust.¹⁶ The jurists lay down the criterion for a *mutawallī* who must be a capable person with necessary skills to manage a waqf. He should be a trustworthy (*āmīn*) and just (*‘ādil*) and must not be a *fāsiq* (sinful) person.¹⁷ The condition of capability requires that a *mutawallī* be a major, however, if a minor is nominated as a *mutawallī*, he will assume that position upon attaining the age of majority.¹⁸ Masculinity and Islam is not a condition as a woman and a non-Muslim can also be a *mutawallī*.¹⁹

The duties of a *mutawallī* have also been specified in *Fiqh* texts. His first and foremost duty is to maintain and exploit waqf property according to the stipulations of the waqf deed.²⁰ The valid conditions of the founder have the force of law, as there is a maxim: ‘the stipulations of the founder are like the provisions of the lawgiver’ (*shurūṭ al-wāqif ka-naṣṣ al-Shāra*’). The *mutawallī* is like the guardian of a minor or an insane person and owes utmost duty of care and loyalty to the founder and beneficiaries. Unlike the traditional trustee under English law, the *mutawallī* is

¹⁵ *Wasik Ali Khan v Government* [1831] 5 Sel Rep 427. The district judge had relied on an earlier case, *Moohummud Sadik v Moohumud Ali* [1798] 1 Sel Rep 23.

¹⁶ IOR/E/4/755, pp110-116.

¹⁷ Al-Shaykh Nizām (n 10) 996.

¹⁸ Ibid 996.

¹⁹ Ibid.

²⁰ Since a waqf is founded in perpetuity, the waqf property is to be maintained in a proper condition and the *mutawallī* is to repair it whether he is authorised by the founder or not. The maintenance expenses are to be incurred before making any payment to the beneficiaries. If the property is exploited by renting it out, maintenance must be paid from the proceeds. If the beneficiaries of a waqf have the right to use only, they themselves are liable for the maintenance of the property and where they are unable to do so or neglect the property, the ruler or the *qāḍī* can evict them and rent out the property in order to generate money for its maintenance. Al-Zuhaylī (n 12) 7670.

entitled to take remuneration for his services.²¹ The *mutawallī* is personally liable for inappropriate conduct. For example, where he pays more than normal wages out of waqf funds.²² The *mutawallī* should not put himself into a position of conflict of interests and where he buys from the waqf property or mortgages it for personal interests, he is to be removed from the office.²³

The external control of the waqf was primarily vested in a *qāḍī*. Therefore, the duties of a *qāḍī* in this respect are discussed in *Fiqh* literature. As the primary object of a waqf is charity, which involves public welfare, the community represented by the state has a stake in it. This is how a *qāḍī* assumes the responsibility for the supervision of a waqf.²⁴ The theoretical justification for the interference of the state through the *qāḍī* into the affairs of a waqf also stems from the conceptual ownership of waqf property by God in favour of mankind.²⁵ A *qāḍī* is a supervisor for the overall management of a waqf. He is authorized to interfere in its management where there is a danger to waqf property either from a negligent *mutawallī* or the founder himself when he is also a *mutawallī*.²⁶ In addition to the *qāḍī* courts, *mazālim* courts and special departments for overseeing awqāf have existed all over the Muslim world

²¹ Ibid 7688.

²² Al-Shaykh Nizām (n 10) 1034.

²³ Ibid 1000. The *mutawallī* cannot lease waqf property to his son or father except on more than the normal rate, at 1005.

²⁴ In the history of waqf, when a *qāḍī* was assigned this duty is not known. The waqf deed found in the *Kitāb al-Umm* written by Al-Shāfi‘ī (d. 204/820) assigns a *qāḍī* a duty to appoint an administrator in case ‘among the existing generation there is no one who is capable and trustworthy’. Al-Shāfi‘ī, *Kitāb al-Umm* (3 of 7 vols, al-Maṭba‘a al-Kubrā al-Amīriyya 1903) 283.

²⁵ For a detailed discussion see M Hoexter, 'Huqūq Allāh and Huqūq Al-‘Ibād as Reflected in the Waqf Institution' (1995) 19 Jerusalem Studies in Arabic and Islam 133.

²⁶ Al-Shaykh Nizām (n 10) 997.

since the second century of Islam (eighth century A.D).²⁷ The powers and duties of such courts and departments varied from time to time and place to place. The historical evidence about their existence and operations is not found in the legal compendia as they fell under the *siyāsa* jurisdiction of rulers. Rulers under this jurisdiction were allowed to deviate from the strict injunctions of Islamic law for protecting the general interests of the community through effective governance and administration of state. Therefore, the head of the *mazālim* courts could have recourse to supra legal measures in order to ensure that public awqāf (*al-awqāf al-‘āmma*) were properly managed in accordance with the stipulations of the founder. Thus he could initiate an investigation into the affairs of the waqf without a formal complaint being filed by the eligible person and could also rely upon official documents without witnesses. However, with respect to private awqāf (*al-awqāf al-khāṣṣa*), he was bound to follow the proper procedure of law as was applicable in a *qāḍī* court.²⁸

While discussing the issue of the administration of waqf in India, the arguments of Muslim politicians had an element of nostalgia.²⁹ One Legislative Council member from the Punjab, Sir Zulfiqar Ali Khan stated that in Mughal India, a separate government department existed for the administration of awqāf as was the

²⁷ According to the information provided by Al-Kindī (d. 350/961), we find that the management of the waqf was assigned to a specialized department (*dīwān*) under the rule of Umayyad Caliph Hishām ibn ‘Abd al-Mālik (reigned 724-743 A.D) at the advice of a judge, Tawba ibn Namīr al-Hadramī in 118/737. Muḥammad ibn Yūsuf Kindī (n 13) 346.

²⁸ Al-Māwardī, *al-Aḥkām as-Sultāniyya (The Laws of Islamic Governance)* (Assadullah ad-Dhaakir Yate tr, Ta-Ha Publishers Ltd 1996) 124-25.

²⁹ Same was true with respect to the debates regarding the administration of Hindu endowments. Time and again reference was made to the benevolent role of ancient Hindu kings who took measures to protect endowed properties. CY Mudaliar, *The Secular State and Religious Institutions in India: A Study of the Administration of Hindu Public Religious Trusts in Madras* (Franz Steiner Verlag GMBH 1974) 49.

case in all independent Muslim countries. Similar statements were made by a member of the United Province Legislative Council, Hafiz Muhammad Ibrahim, who mentioned that a department named as *Nāzir ul Mazālim* was maintained by Muslim rulers for the administration of awqāf.³⁰ Ameer Ali also asserted that the supervision of endowments was the responsibility of the government in Muslim countries and the officer in charge of such functions in Turkey was called *Nāzir-i-awqāf*.³¹

As the judge of the Calcutta High Court, Ameer Ali held that in British India the place of the *qāḍī* was taken by the civil court, which was to exercise the powers of a *qāḍī* vis-à-vis awqāf.³² This ruling was followed by John Woodroffe J in *Re Woozatunnessa Bibee*.³³ However, Pugh J refused to assume jurisdiction as extensive as that of a *qāḍī* in the absence of any statutory power in *Re Halima Khatun*.³⁴ Five years later, Mookherjee J observed that under Muhammadan law no *qāḍī* had authority to deal with the administration of waqf unless he was specifically authorised. Therefore, civil courts could not exercise the powers of a *qāḍī*.³⁵ Earlier Mookherjee had noted that the British system of administration of justice differed, in so many essential respects, from the Muhammadan judicial system that any analogy

³⁰ Extracts from the Proceedings of the United Provinces Legislative Council, dated 9 November 1936, 1. IOR/L/PJ/7/1227: 4 Dec 1936-4 Nov 1941. Similar views were expressed earlier by Muhammad Aslam Saifi and Dr Shafa'at Ahmad Khan, members of United Provinces Legislative Council. Extracts from Official Report of the United Provinces Legislative Council dated 27 February 1924, 103-04, 108. IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

³¹ Report of the Muhammadan Educational Endowments Committee (n 6) vii.

³² *Shama Churn Ray v Abdur Rahim* [1898] 3 CWN 158 (Pratt J concurred)

³³ [1908] 36 Cal 21.

³⁴ [1910] 37 Cal 870.

³⁵ *Atmanissa Bibi v Abdul Soban* [1915] 20 CWN 113.

between the position of a *qāḍī* and that of a judge ‘must be more or less farfetched’. He regarded such an analogy ‘more or less artificial’ because a *qāḍī*, assisted by a *muftī*, was entrusted with the exercise of discretion ‘not merely because he was a judicial officer, but also because he was well qualified to form an opinion as to what would be beneficial to Muslims from an orthodox religious point of view.’³⁶ In other words, he meant that a *qāḍī* performed both religious and secular functions unlike a judge under the British legal system. Meanwhile Ameer Ali was appointed the councillor at the Judicial Committee of the Privy Council. He reiterated his earlier position on this point by holding that the civil courts had taken the place of a *qāḍī* in the British Indian system in *Mahomed Ismail Ariff v Hajee Ahmed Moola Dawood*.³⁷ This was further endorsed by the Privy Council in *Mahomedally Adamji Peerbhoy v Akberally Abdulhussein Adamji Peerbhoy*.³⁸ Despite the endorsement of such general principles by the highest appellate forum, as will be seen below, the civil courts did not assume the executive functions over *awqāf* as might have been done by a *qāḍī*.³⁹

³⁶ *Nimai Chand Addya v Golam Hossein* [1910] ILR 37 Cal 179 (Vincent J concurred).

³⁷ (Lower Burma) [1916] UKPC 40, 18 BLR 611.

³⁸ (Bombay) [1933] UKPC 98.

³⁹ The office of the *qāḍī* existed side by side with the East India Company Courts during the early days of the Company’s assumption of power in Bengal. A *qāḍī*’s functions were restricted to the preparation and attestation of conveyances and other legal deeds, celebration of marriages and other ceremonies. Under the Regulation V of 1794, the judge within a city or town was to recommend an appropriate person for the appointment of a *qāḍī* in case the office fell vacant. The independence of a *qāḍī* was curtailed by making him liable to be sued in the civil courts ‘for any undue practice in the discharge of duties prescribed to them’. In addition, a *qāḍī* was given a fixed salary and was prohibited from charging fees for his services, as was the practice before the British, except where the parties voluntarily agreed to pay. Harington, *An Elementary Analysis of the Laws and Regulations enacted by the Governor General in Council at Fort William in Bengal* (1 of 6 vols, The Honorable Company’s Press 1805) 209-12.

An earlier report on awqāf in Bengal noted that large discretionary powers were given to the managers under waqf deeds.⁴⁰ Therefore, Ameer Ali argued that the principle in *Morice v Bishop of Durham* did not apply to waqf in India. He justified this by arguing that the doctrine of *cy pres* is carried to the utmost limit under Islamic law and the waqf does not fail with the failure of the original purpose.⁴¹ One trust deed provided that the trustee could not be called to account nor could a complaint be made before any authority for the dishonesty of the trustee who was to discharge his duties mindful of the omnipresence of God.⁴² The addition of such a clause in a waqf deed wherein the settlor was the first trustee was not surprising, as one settlor provided that no one was to require the *mutawallī* to render accounts while he himself was the first *mutawallī*.⁴³ The courts did not hesitate to give effect to such clauses despite reserving power to ask the *mutawallī* in a proper case to explain accounts.⁴⁴ Limited right to call for accounts was provided in one deed which specified that only the heirs of the donor were entitled to call upon the trustee to render proper accounts.⁴⁵ One settlor, who had bitter experience of litigation, provided that whoever raised an objection to the provisions of his waqf deed would lose his share of the proceeds in waqf property. He declared that all claims against his property be

⁴⁰ Report of the Muhammadan Educational Endowments Committee (n 6) 29.

⁴¹ Ali, *Mahomedan Law*, (Law Publishing Company 1976 (first published in 1892)) 414. This view was endorsed by Tyabji. Tyabji, *Muhammadan Law* (3rd edn, N. M. Tripathi 1940) 603-04. It was held in *Morice v Bishop of Durham* [1805] EWHC Ch J80, 10 Ves Jun 522, 32 ER 947 that 'a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve' was void for uncertainty.

⁴² *Bishen Chand Basawut v Syed Nadir Hossein* (Bengal) [1887] UKPC 45, 15 IA 1, 3.

⁴³ *Mujib-un-Nisa v Abdul Rahim* (Allahabad) [1900] UKPC 65, 23 ILR (All) 233.

⁴⁴ This was held in a post Independence case by the Allahabad High Court. *Maqsood Ali v Zahid Ali* AIR 1954 All, 385, 389-90.

⁴⁵ *Mutu K. A. Ramannan Chettiar v Vava Levvai Marakayar* (Madras) [1916] UKPC 107, 44 IA 21.

considered null and void.⁴⁶ Only one waqf deed put onerous conditions on the *mutawallī* by requiring him to keep an account of the income and expenditure along with the vouchers of the said account in a book.⁴⁷ Another waqf deed provided for the removal of the *mutawallī* in the event of ‘slackness, negligence, or discovery of misappropriation’ on his part.⁴⁸

Unlike the trustee under English law, this strong position of a *mutawallī* over the funds of a waqf made his office lucrative. This led to a large number of cases in which the issue of succession to the post of *mutawallī* was contested. Thus out of the twenty-five reported cases in the *Sadr Diwani Adalat* between 1798 and 1858, seventeen involved public awqāf. Succession to the post of *mutawallī* as *sajjādanashīn* was the most contentious issue as it was the primary issue in ten cases. Likewise, at least three cases, involving the issue of succession to the office of *sajjādanashīn*, reached the Privy Council.⁴⁹

3. Patronage and Profits in the Management of Endowments

There was a close connection between awqāf and the state in pre-colonial India. In fact the state and its officials were the leading founders of the most important

⁴⁶ *Phate Saheb Bibi v Damodar Premji* [1879] ILR 3 Bom 84; GC Kozlowski, *Muslim Endowments and Society in British India* (CUP 1985) 134.

⁴⁷ *Abadi Begum v Bibi Kaniz Zainab* (Patna) [1926] UKPC 92, 54 IA 33.

⁴⁸ *Bibi Akhtari Begam v Diljan Ali* (Patna) [1922] UKPC 113.

⁴⁹ *Khawaja Muhammad Hamid v Mian Mahmud* (Lahore) [1922] UKPC 88; *Pir Ahsanullah Shah v Pir Ziauddin Shah* (Sind) [1937] UKPC 4; *Sain Maule Shah v Ghane Shah* (Lahore) [1938] UKPC 29.

endowments.⁵⁰ In cases of large awqāf, state officials were often appointed as managers. The power and position of officials provided a safeguard against confiscation and also symbolized patronage for the provisions of public utilities. It is not surprising that one of the last kings of Oudh desired that the Company Resident⁵¹ should supervise funds for the endowment of his newly built palace and tomb, though the Resident in fact refused to assume that duty.⁵²

Places of worship including mosques and temples were supervised by the officers of the government during Hindu and Muslim rule of India. In fact the supervision and protection of religious institutions was one of the important duties, which native Indians expected from their rulers.⁵³ Endowments offered huge political and financial opportunities to the British, but at the same time their administration posed daunting challenges in particular of getting embroiled into religious and sectarian issues. Being foreigners of different faith than that of the natives, officers of the Company had to be extremely cautious while dealing with religious institutions, not only because of the emotional attachment of natives to religious places, but also because of the influence and power of priests, both Hindu and Muslim. As the Company assumed ever more political power to fill the vacuum created by the decline of Mughal authority, it could hardly afford to remain indifferent to the administration

⁵⁰ The emperor himself was the *mutawallī* of the waqf for *Tāj Mahal*. I Habib, *The Agrarian System of Mughal India 1556-1707* (2nd edn OUP 1999) footnote 77, 359.

⁵¹ A Resident usually was a senior official posted in the capital of a princely state. He was a representative of the Company in the state just as a diplomat. In fact Residents symbolised an indirect rule because of the important role played by them in the states they were appointed. They kept a check on local rulers by ‘advising’ them on internal governance of the state as well as on its external affairs. BD Metcalf and TR Metcalf, *A Concise History of Modern India* (3rd edn, CUP 2012) 75.

⁵² IOR/E/4/826, p315.

⁵³ DJM Derrett, *Religion, Law and the State in India* (Faber 1968) footnote 4, 179.

of religious endowments. The Company assumed the administration of religious endowments as an important function of government in keeping with the tradition of its predecessors.⁵⁴ As the ruling authority in the territories controlled by the Company, it collected taxes on land and trade. A large number of religious endowments were supported by tax grants of previous rulers. Under the newly installed administrative system, the tax collector, as the agent of the Board of Revenue, was responsible for both revenue collection and maintenance of law and order in a district.⁵⁵

During its early days of the assumption of power in India, the Company did not have a consistent policy on this issue, rather its officers were dictated by pragmatism and their involvement in religious institutions varied depending upon the circumstances. Nevertheless, promotion of commercial interests and enhancement of political influence remained at the heart of the official attitude towards the administration of religious endowments.⁵⁶ In order to guide its officers and regularize its policy towards religious endowments, the Company assumed the control of public endowments as the successor of the defunct regime under the Bengal Regulation XIX of 1810 for the 'better management and protection of public properties'. The Regulation acknowledged that considerable land was granted to endowments both by the state and individuals 'to support mosques, Hindu temples, colleges and other pious and beneficial purposes'. The government vested the general superintendence of all

⁵⁴ A Ahmad, 'The Sufi and Sultan in Pre-Mughal Muslim India' (1963) 38 *Der Islam* 142; RM Eaton, 'The Court and the Dargah in the Seventeenth Century Deccan' (1973) 10 *The Indian Economic and Social History Review* 50; N Chatterjee, *The Making of Indian Secularism: Empire, Law and Christianity, 1830-1960* (Palgrave Macmillan 2011) 57.

⁵⁵ Mudaliar (n 29) 7; BB Misra, *The Central Administration of the East India Company, 1773-1834* (Manchester University Press 1959) 115-6.

⁵⁶ Mudaliar (n 29) 6.

waqf lands in the Board of Revenues and the Board of Commissioners. However, it was clarified in the Regulation that it was not promulgated in order to appropriate the dedicated property. Rather its main objectives were to apply the endowed property according to the real intent of the donor and to maintain public buildings and bridges.

Under the Regulation, damaged public buildings were repaired and dedicated buildings, which were irreparably ruined, were sold. Local agents were appointed in order to make sure that the dedicated properties were not appropriated for private benefits and escheats were properly disposed of. This Regulation was extended to Madras in 1817, but not to other provinces such as Bombay and the Punjab. The Regulation left the actual management in the hands of local trustees or managers. The local agent, who in most cases was the district Collector, supervised these trustees and managers in order to ensure that the endowed property was duly appropriated. The Collector also recommended appropriate candidates to be appointed as trustees or managers. The Collector acted under the authority and control of the Board of Revenue, in which the general supervision of religious endowments was vested.

Official reports showed that control by the local agents of the Revenue Department included the calling of accounts, local investigation, supervision of *mutawallī*, appointment of *mutawallī*, and directions to *mutawallī* for repairing of buildings.⁵⁷ However, the management of Muslim mosques and Hindu temples by Christian foreigners was not without the danger of offending the religious sentiments of natives. Therefore, in 1838, the Regulation 1810 was modified so as to admit

⁵⁷ Despatch (Judicial) No. 6998 from E. H. Lushington Officiating Secretary of the Government of Bengal to the Secretary for the Government of India, Home Department, 8 December 1859, *HCPP*.

‘native gentlemen’ to become members of local agencies for the administration of endowments.⁵⁸ In the same year the Governor General of India was instructed by the House of Commons to hand over the management of temples and other religious places to natives.⁵⁹ The Court of Directors of the East India Company expressed their complete satisfaction at the progress made for effecting ‘a final and complete separation of Government’ in the management of temples in their Despatch of 1841.⁶⁰ In August 1841, they proposed that the general superintendence of all endowments be rescinded.⁶¹ The Government of India expressed the same view in 1846.⁶² Officials were instructed to limit the scope of their administration of endowments ‘strictly excluding all object of a religious character’.⁶³

4. Transformation from Executive to Judicial Control

The confiscation of endowed properties and the official interference in religious institutions was seen as constituting one of the main causes of the uprising in 1857.⁶⁴ But it would be wrong to assume that the uprising in 1857 played a key role in the change of policy on the management of religious endowments. Company officials had

⁵⁸ Official Despatch, reply dated 2 June 1838 to a letter dated 16 April 1838. IOR/E/4/762, p128.

⁵⁹ Despatch Revenue Department No. 9 dated 8th August 1838 relating to the withdrawal of interference with the religious ceremonies of the natives of India, *HCPP*.

⁶⁰ Despatch (Legislative Department) No. 11 of 1841 dated 31 March 1841 from the Court of Directors of the East India Company to the Governor General of India in Council, *HCPP*.

⁶¹ Legislative Despatch No. 17, dated 25 August 1841 referred in Despatch from the Secretary of State No. 2, Legislative, dated 24 February 1859 IOR/L/PJ/3/1214, p87-108, p91.

⁶² Despatch No. 21 dated 7th January 1846 referred in Despatch from the Secretary of State No. 2, Legislative, dated 24 February 1859 IOR/L/PJ/3/1214, p87-108, p92-3.

⁶³ Letter dated 23 December (No 145) 1856. IOR/E/4/847, pp1147-1152.

⁶⁴ WW Hunter, *The Indian Musalmans* (3rd edn Trübner and Co. 1876) 148-49; Sir Syed Ahmad Khan, *Risāla Asbāb-e Baghāwat-e Hind* in Quraishi, Sa-D (ed), *Causes of the Indian Revolt: Three Essays* (Sang-e-Meel Publications 1997) 50, 76.

already started to divest the control of religious endowments as early as 1841,⁶⁵ and in Madras this process had started even earlier.⁶⁶ The new policy proposed transformation from administrative to judicial control of endowments.⁶⁷ Whereas earlier the district collectors directly managed the endowments, from here on they withdrew their control. But courts could still ensure that the funds of endowments were properly applied and the disputes relating to succession to the office of manager were resolved in accordance with law. This policy was a direct result of the petitions by the Protestant Missionaries from Bengal.⁶⁸ Earlier the Bishop of Madras had sent a memorial to the Government on the objectionable control of religious endowments by ‘Christian servants of the Government’ and prayed that the Madras Regulation of 1817 should be rescinded.⁶⁹

The new policy was envisaged in the Religious Endowments Act 1863. During the legislative debates on this Act, Sir Bartle Frere pointed out that at the time of the passing of the Charter Act 1833, the Court of Directors instructed the revenue officers to absolve themselves from all official connections with the management of religious

⁶⁵ Despatch dated 17 May 1841 from the Court of Directors to the Governor General of India, on separating the Government of India from all connexion with the idolatry of their Hindoo and Mahomedan subjects, *HCPP*.

⁶⁶ Board of Revenue Consultation, 8 August 1836, 1515: 10711-12 referred in A Appadurai, *Worship and Conflict under Colonial Rule* (CUP 1981) 157.

⁶⁷ Despatch from the Secretary of State No. 2, Legislative, dated 24 February 1859 IOR/L/PJ/3/1214, pp87-108.

⁶⁸ *Ibid.*

⁶⁹ The memorial of the European population of Madras to the Governor of that presidency, transmitted in August 1836, relative to the religious ceremonies of the natives. 1837 (357) Religious ceremonies, Madras, *HCPP*.

and charitable endowments.⁷⁰ One member of the Legislative Council criticised the official supervision of endowments by the Board of Revenue for the ‘revenue officers as Christians exercising control over the affairs of Heathen Institutions.’⁷¹ It was pointed out that some officials regarded it as a serious burden on their religious conscience to manage Hindu and Muhammadan endowments. This was supplemented by the ‘burden of expropriation of endowment funds’ on the conscience of the officials of the Government, who had consistently followed the example of previous governments of taking a ‘portion of these funds’ into the Treasury as part of revenue.⁷² So far as the effective management of endowments was concerned, the official attitude was reflected in a circular issued by the Chief Commissioner to all Commissioners in the Punjab in 1858. The circular instructed the officers regarding disputes connected with ‘shrines, temples, mosques, tombs and such like institutions’. It emphasized that such disputes should be resolved in accordance with the law, and continued:

Our officers will have nothing to do with the management or administration of these institutions; they will not frame nor caused to be framed rules regarding them; they will not make any general arrangements for the benefit of, or the better regulation of these institutions. They will settle particular disputes which may arise, but will not consider how much disputes may be prevented. The people must manage their own institutions. If such institutions suffer from internal disputes, that is their business, not our’s [sic].⁷³

⁷⁰ *PILC*, 1860, vol. VIII, IOR/V/9/6, p477.

⁷¹ *Ibid* 470.

⁷² *Ibid* 480.

⁷³ Despatch No. 23, Lahore, dated the 25th August, 1858 from R. Temple, Secretary to Chief Commissioner for the Punjab, to all Commissioners in the Punjab included in 1860 (31) East India (Hindoo shrines, &c.) pp38-39, *HCPP*.

The opponents of government's divesting of control of endowments, on the other hand, had two main objections. First, divesting of control of endowments not relating to religion was not desirable because an abrupt withdrawal of such control would have done much harm to them. Secondly, a sudden and abrupt relinquishment of official guardianship of the property of religious and charitable endowments, without making any provisions for their future management might have been unjust.⁷⁴ Therefore, the 1863 Act tried to provide a remedy against these objections by dividing the religious endowments into two classes: first, in which the appointment of a trustee or manager was vested in the local government or required its confirmation; and second, in which no such power was vested in the local government. A Committee of Management replaced the local government in case of the former endowments while for the latter, the trustee or manager was left free from any control by the Board of Revenue or Local Agents. However, both types of endowments were under the control of civil court in case of any breach.⁷⁵ Mr Sconce, one member of the Legislative Council, saw no difference between a Christian Collector and a Christian judge.⁷⁶ He suggested that some sort of control must be exercised by the government, and submitted a Draft Bill which envisaged judicial control of endowments by empowering any person to raise the issue of the mismanagement of a particular endowment before the courts. The Bill also proposed powers of investigation through a jury of natives in the courts.⁷⁷ These views were rebutted by another member, Mr

⁷⁴ Statement of Objects and Reasons by Cecil Beadon dated 5 February 1862. IOR/L/PJ/5.

⁷⁵ Report of the Select Committee dated 20 February 1863. IOR/L/PJ/5.

⁷⁶ *PILC*, 1860, Vol. VIII, 470-71.

⁷⁷ Despatch No. 8, dated 7 July 1859 from A. Sconce, Member of the Legislative Council, to A. R. Young, Secretary to the Government of Bengal. 1860 (313) East India (Hindoo temples), *HCPP*.

LeGeyt, who argued that a judge should not administer endowments rather he should interfere only for the purposes of carrying out the intention of the donors.⁷⁸ The latter view was in conformity with the instructions from the Secretary of State for India on this issue. These instructions clearly provided that courts would not interfere in the management of endowments, rather their role would be limited to the adjudication of endowment related disputes.⁷⁹

After long deliberations, the Government divested itself from the control of endowments by repealing the provisions of the Bengal Regulation XIX of 1810 and Madras Regulation VII of 1817 related to the endowments for the support of mosques, Hindu temples or other religious purposes. The Act, however, divested control of religious endowments only, and secular endowments remained under government control. One difficulty arose regarding endowments which had a partially religious and partially secular character. In such cases, the Board of Revenue was empowered to determine the portion of the property endowed for secular purposes, which was not to be transferred to either the Committee or the Trustee (s 21). However, the Act did not define religious and secular purposes. The control of religious endowments was handed over to local committees. The members of local committees were appointed for life (s 9). In order to avoid conflict of interests, it was provided that no member was to be a trustee of an endowment (s 11). Any interested person could bring a suit and the nature of interest was not limited to a pecuniary, direct or immediate interest. Any person having a right of attendance or having been in the habit of attending any

⁷⁸ *PILC*, 1860, Vol. VIII, 476.

⁷⁹ Despatch of the Governor General of India No. 25 dated 15 March 1860, on the subject of religious endowments in India. Paper No. 516 (1860), *HCPP*.

worship or partaking in the benefit of any distribution of alms was deemed to be an interested person (s 15). In order to facilitate the solution of disputes at a local level, the court could refer the dispute to arbitration (s 16). The trustees or managers or committees were required to keep accounts and the court dealing with a dispute might also require them to file accounts of the trust (ss 13 and 19). But there was no requirement for the audit of accounts. The government apprehended that the absence of official control was likely to put the endowments at risk. Therefore, it reserved the power to intervene in order to protect antique buildings of historical significance (s 23).

The transformation from administrative to judicial control of endowments brought a significant change.⁸⁰ The ultimate control and power to resolve endowment related disputes remained in the hands of judges. This was in line with the practice of the Mughal system in which a *qāḍī* was assigned the duty of the supervision of *awqāf*.⁸¹ But unlike the British judge, the *qāḍī* was an administrator as well as adjudicator. The same was true regarding a magistrate in British India, because the separation between executive and judiciary did not exist at the district level. However, unlike the decisions of the superior courts in India, the decisions of a *qāḍī*, even if he were a chief *qāḍī*, did not set a precedent to be followed in later decisions, neither was he bound by his own previous decisions.

⁸⁰ It is rather ironic that this Act was passed three years after the Commissioners of the Charity Commission of England and Wales were given powers equal to those of a 'Judge of the Court of Chancery' under section 2 of the Charitable Trusts Act 1860. D Owen, *English Philanthropy 1660-1960* (OUP 1964) 300.

⁸¹ Ahmad, *The Administration of Justice in Medieval India* (The Aligarh Historical Research Institute 1941) 85-87, 122; *Doe Dem Jaun Beebee v Abdollah Barber* [1838] Fulton 344, 1 SCR 848.

In the year following the passing of the 1863 Act, the administration of awqāf in India suffered another blow when the post of *qāḍī* was abolished under the Kazi (Qāḍī) Act 1864. Thus the administration of awqāf remained solely in the hands of trustees who were supervised by local committees. This system, however, did not work well and soon complaints were made about the large-scale embezzlement of endowed funds by their trustees. As the local committees and courts did not have sufficient legal powers to put a check on the activities of trustees, most of the trustees treated the endowed property as their personal estate.

5. Failure of Judicial Control and Self-governance

From a regulatory perspective, the transformation from administrative to judicial control of religious endowments was a complete failure. After only three years of the legal change introduced under the 1863 Act, a new Bill was framed at the instance of the Madras Government to remove certain defects in the Act. An official inquiry into certain religious endowments showed that the Act failed to stop mismanagement and corruption of the managers of religious endowments. Several committees were appointed in 1868, 1874, 1876, 1884, 1888 and 1894 to consider the current state of law and suggest modifications for the better governance of endowments.⁸² Based on these recommendations, several Bills were introduced at local and central legislatures, but they were all rejected by the central Government of India because of their

⁸² Kozłowski's work on awqāf did not take into account these developments. Kozłowski, *Muslim Endowments* (n 46) 174-77; GC Kozłowski, 'Community Building and Communal Control of Muslim Endowments (waqfs) in Modern South Asia' (1996) 79 *Revue du monde musulman et de la Méditerranée* 201, 205.

inconsistency with the policy and principles envisaged in the 1863 Act.⁸³ The details of these proposals are discussed below.

A Committee of Hindu members was formed in Orissa in February 1868 at the request of certain inhabitants to enquire into the condition of endowments and to propose amendments to the 1863 Act. They recommended the establishment of a Central Committee consisting of Hindu and Muslim members with plenary powers over the administration of endowments to appoint or dismiss the managers or frame rules for their guidance. The members of the Central Committee were to be appointed for life and the vacancies were to be filled by using a co-optative system. A sub-committee was to be appointed, representing and acting for the Central Committee. In effect, the Central Committee was to replace the Board of Revenue under the 1810 Regulation. The Government of India rejected this plan because it departed from its policy of non-interference in religious endowments. The issue reappeared within the next decade and Sir William Robinson's Committee (1876) in Madras submitted three draft Bills, which presented the feature of a Central Board with a staff of Inspectors and Auditors to control and regulate the administration of religious endowments. This plan was sketched on the lines of the English Charitable Trust Acts of 1853, 1855 and 1860. After sympathising with the views of 'more enlightened members of the Indian community' for the management of local endowments, the Government of India refused to depart from the principles embodied in the 1863 Act. This scheme was approved by the Muhammadan National Association with minor modifications while the Muhammadan Literary Society preferred the system of government supervision embodied under the 1810 Regulation. However, the Bihar Landlords Association

⁸³ IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

regarded any change unnecessary because of the practice of family settlements which rendered it difficult for any authority other than civil courts to guard public interests without interfering with private and proprietary rights.⁸⁴

The two extreme views envisaged under the 1810 Regulation and the 1863 Act were amalgamated in the proposal of the Lieutenant-Governor of Bengal, Sir Ashley Eden in 1880. He suggested that the native Committee, appointed by the government, should report on the endowments in a particular district. The Committee should have the power to sue trustees for misfeasance in civil court and must be empowered to require accounts from them. The Committee should also have the power to draw up a scheme of management and expenditures in order to ensure that the funds were spent for the intended purposes. The Governor General appreciated this plan, but regarded it as neither desirable nor practicable because of its departure from the policy of non-interference by the government in religious affairs.⁸⁵

5.1 Report of the Muhammadan Educational Endowments Committee

The Central National Muhammadan Association led by Ameer Ali presented a memorial to the Government of India in February 1882. It showed the poor position of Muslim education and suggested that there were a large number of endowments, which beside religious objects had the original objective of the promotion of learning. Two endowments, Sasseram *khānqāh*, established in 1717 and Mohsin Endowment,

⁸⁴ Report of the Muhammadan Educational Endowments Committee (n 6) 41.

⁸⁵ Ibid 42-43.

founded in 1806 were specifically mentioned.⁸⁶ It proposed that a Commission be appointed to examine the nature of such endowments and consider the possibility of whether they could be applied for the education of Muslims.⁸⁷ Ameer Ali reiterated his proposal in his evidence before the Education Commission in 1882.⁸⁸ The Government of India passed a resolution on 15 July 1885 asking the Local Governments of Madras, Bombay, Bengal, the North West Province (NWP), Oudh, and the Punjab to appoint a small committee for this purpose.⁸⁹ However, after initial investigation, it was noted that the number of Muslim educational endowments in the Punjab, NWP and Oudh was not considerable and there was no sign of their abuse there. Therefore, no special investigation was conducted in these provinces.⁹⁰

The Muhammadan Educational Endowments Committee found it difficult to draw a distinction between endowments for secular or religious education. It rejected the idea that the surplus from religious endowments should be spent on educational institutions. It also rejected the proposal that the central committee be vested with

⁸⁶ These endowments were badly affected by the mismanagement of their trustees. One of the superiors (*sajādanashīn*) of the Sasseram *khānqāh* alienated most of the land of the endowment to his descendants in female line because he did not have male heirs to succeed him. Ibid 30-32. The proper objects of the Mohsin Endowment were neglected and money was spent on quarrels between managers, bribes to police and *āmīns* (judges) and gifts to the relatives of managers. *Wasik Ali Khan v Government* [1831] 5 Sel Rep 427.

⁸⁷ Surplus funds of religious endowments were in fact spent on various objects of public utility, and education was one of them. See the Papers submitted to the House of Commons on connection of the Government of India with Idolatry or Mohammedanism, pp276-77 referred in Mudaliar (n 29) 21-22.

⁸⁸ Education Commission Report by the Bengal Provincial Committee with Evidence taken before the Committee and Memorials addressed to the Education Commission (1884) reproduced in Ali and Muhammad, *The Right Hon'ble Syed Ameer Ali: Political Writings* (South Asia Books 1989) 137-57.

⁸⁹ Report of the Muhammadan Educational Endowments Committee (n 6) 1.

⁹⁰ Ibid 46.

inquisitorial powers with respect to non-educational endowments.⁹¹ The Committee recommended the simplification of procedures for the filing of suits relating to endowments. It was noted that three separate sanctions from the Chief Court of the district, the Court hearing the case and the Advocate General were required in order to file such a suit. Moreover, except in the case of the few endowments falling under the 1863 Act, the person suing was required to have a 'direct' interest in the endowment. Therefore, the Committee proposed that only the sanction of the Advocate General should be required for the filing of such a suit and the requirement of 'direct' interest should also be removed.⁹² A preliminary report of the committee recommended that the initial legal cost of the suit should be borne by the Government, which would ultimately be recovered from the defendants or the endowments on the determination of the court. The Government of Bengal accepted this recommendation.⁹³

On the crucial issue of the administrative or judicial control of endowments, the Committee recommended that the Government should adhere to the policy embodied in the 1863 Act, and that the Muslim community should remain vigilant in bringing cases of abuse before the courts.⁹⁴ The Government once again resisted change in its policy of non-interference in the affairs of religious endowments, although it was ready to facilitate their control through the judiciary.

⁹¹ Ibid 47-51.

⁹² Ibid 50.

⁹³ Ibid 49.

⁹⁴ Ibid.

5.2 Four Failed Legislative Proposals

The Government of India had rejected every proposal which suggested official control for religious endowments by that time. This gave rise to the less ambitious proposal of D.F. Carmichael (1884) in Madras. It suggested an exemption of small and hereditary endowments from the control of the District Board. The Board was empowered to remove trustees for gross mismanagement. However, the proposal included a bold suggestion of the diversion of the surplus funds of religious endowments to secular purposes. There was a difference of opinion on this issue, which led the Madras Government to appoint a new Committee under Sullivan.⁹⁵ A Bill based on the recommendations of the Sullivan Committee was submitted to the central Government in 1887. It proposed a Central Board and local Boards. The members of the Central Board were to be appointed by the High Court instead of the Governor. The Government of India rejected the proposal because it was too wide in its application, and was not in harmony with the policy of the 1863 Act.

By then it was clear that the Government would not deviate from its policy of non-interference in religious endowments. However, the issue of the mismanagement of endowments could hardly be ignored. Therefore, in 1888 the Madras Government appointed Justice T. Muthuswami Aiyar's Committee. It proposed a Bill within the parameters of the policy envisaged in the 1863 Act by investing the district judges with additional duties. The draft Bill of 1893 abandoned the idea of the Central Board and proposed supervision by local committees, comprising half elected and half district court appointed members. The trustees of each endowment were to be elected

⁹⁵ Mudaliar (n 29) 34.

and the local committee to have an extensive authority over them. The trustees were also required to maintain accounts. This proposal, like the proposal of the Sullivan Committee, did not extend to Muslim endowments.⁹⁶ Although the Governor of Madras regarded the policy of the 1863 Act as a 'grave error', the Government of India remained unconvinced and objected to the Bill because it attempted to vest district judges with the functions of an executive. It also noted that the 'general feeling of the orthodox community was opposed to change'. The central Government, however, was willing to reduce the stamp duty for suits under the 1863 Act to nominal in order to facilitate suits for the management of endowments.⁹⁷

However, the facilitation of the filing of suits was not the appropriate solution for the problem. Therefore, the Madras Government appointed another Committee under Chenstal Rao in 1894 to propose alterations in the Bill in accordance with the objections raised by the Government of India. The Bill was submitted in 1899. It suggested an extension of control to religious institutions, the appointment of whose trustees was subject to the sanction of the government prior to 1842. It also required hereditary trustees to submit annual accounts to the Committee. The Government of India rejected the Bill because it extended the scope of the 1863 Act to new classes of trustees.⁹⁸

⁹⁶ Government of India Letter, Home Department (Public), dated 23 February 1888 referred in Letter No. 4 of 1913, Judicial, dated 30 January 1913 to the Secretary of State for India, p4. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

⁹⁷ Ibid p5.

⁹⁸ Mudaliar (n 29) 36.

Earlier in 1896, one member of the Madras Legislative Council, Kalyanasundaram Iyer had introduced a private Bill to remove five defects from the 1863 Act: (i) life membership of the Committee; (ii) absence of a provision for scrutiny and publication of accounts; (iii) absence of a provision for the revision of voters' list; (iv) the Committee's inability to deal effectively with negligent trustees; (v) lack of finance for the establishment of the Committee. The Bill was withdrawn because Chenstal Rao's Bill was under consideration.⁹⁹

5.3 The Charitable Endowments Act 1890

In her book, the *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*, Ritu Birla regarded the Charitable Endowments Act 1890 as a product of case law in the 1870s on 'the regulation of charitable and religious endowments'. According to her, the Act 'broadened up local government's direct control over endowments for public benefit'.¹⁰⁰ However, the Act was neither the product of case law nor did it provide any controlling mechanism by local governments. It is true that the Act was passed as a result of legal problems, which arose because trust property was vested in officials. However, the Act did not envisage any administrative system. It only provided for the appointment of treasurers of charitable endowments as officials to perform the functions similar to those performed by the Official Trustee of Charity Lands and Charitable Funds in England. This is evident from the preamble of the Act, which stated the aim of the Act as 'to provide for the vesting and

⁹⁹ Ibid 38-9.

¹⁰⁰ R Birla, *Stages of Capital: Law, Culture and Market Governance in Late Colonial India* (Duke University Press 2009) 72 and 99-100.

administration of property held in trust for charitable purposes.’ The charitable purpose under the Act included ‘relief of the poor, education, medical relief and the advancement of any other object of general utility’. But it excluded a purpose which was related ‘exclusively to religious teaching or worship’ at the suggestion of Justice Syed Mahmood.¹⁰¹ The Statement of Objects and Reasons of the Bill clarified that the Treasurer of Charitable Endowments would be a corporation sole, in whom the property would be vested but he would have ‘nothing to do with the administration of the property’.¹⁰²

The name of the Act misled many to think that it was enacted for the administration of charitable endowments. This was evident from the comments of the Central Muhammadan Association, which requested the extension of the Act to endowments of a quasi-religious character. This was partially endorsed by the Muhammadan Literary Society.¹⁰³ However, the British Indians Association cautioned the Government that the Act should not be extended to religious endowments. The official members of the Legislative Council noted the divergence of opinion on this issue and reiterated the policy of non-interference in religious endowments as envisaged under the 1863 Act by emphasising that the judicial control provided under the Act was sufficient.¹⁰⁴

¹⁰¹ IOR/L/PJ/6/273, File 522: 4 Mar 1890.

¹⁰² IOR/L/PJ/6/274, File 608: 18 Mar 1890.

¹⁰³ Ibid.

¹⁰⁴ *PILC*, dated 7 March 1890, 1-5. IOR/L/PJ/6/274, File 608: 18 Mar 1890.

5.4 Bills of Ananda Charlu, Srinivasa Rao and Rash Behari Ghose

Despite the continual refusal of the Government to deviate from its policy of non-interference into the management of endowments, constant efforts were made by native politicians to provide an effective mechanism for state control of endowments. In 1897 Ananda Charlu proposed ambitious changes in the law relating to endowments in a Bill introduced in the Imperial Legislative Council. The Bill envisaged a uniform framework for the endowments of all religions. The chief district civil court was to prepare an electorate for each religion for the election of district committees for the control of the endowments of each religion. These committees were to have absolute control over the endowments, including the power to appoint and dismiss trustees, and the making of byelaws for the endowments. The Government did not commend the proposal but granted the leave for its introduction by reserving its right to oppose it later. The proposal was sent to the local governments and opinions were solicited from the general public.¹⁰⁵ This process spanned over a period of four years, but the proposal was not positively received and was withdrawn in 1901.¹⁰⁶

After the failure of several attempts to bring a significant legal change, G. Srinivasa Rao proposed relatively smaller amendments. He suggested that the terms of members of the committee under the 1863 Act should be restricted to five years, and the annual accounts of endowments should be published. The proposal was

¹⁰⁵ Papers relative to the Charitable Endowments Bill. IOR/L/PJ/6/257, File 1188: 21 Jun-7 Nov 1889; Papers relative to the Religious Endowments Bill. IOR/L/PJ/6/505, File 533: 2 Mar 1899.

¹⁰⁶ The Religious Endowments Bill (withdrawn), *PILC*, 1 March 1901, IOR/L/PJ/6/565, File 558: Mar-Apr 1901.

rejected by Lord Curzon's Government in 1903. There were two main reasons for this rejection. First, the limitation of the term of committee members was likely to result in 'electoral intrigues and dissension'. Second, the publication of accounts without formal audit could be defeated by the fabrication of false documents, while the formal audit was open to objection on the ground of interference in the management of endowments.¹⁰⁷

Five years later, Dr Rash Behari Ghose promoted a Bill to 'afford greater opportunity for inspection of accounts of public charities'. Under this proposal, two or more persons, after obtaining the consent of the Advocate General, could apply to the civil court to direct any trustee of a public or religious charity to file accounts for a period not exceeding three years prior to the application. A trustee who failed to provide such accounts could be removed. The opinion of various provincial governments was divided on this issue. The central government apprehended that the measure might inflame 'religious animosity' and opposed the Bill, which was eventually laid to rest.¹⁰⁸

Meanwhile the judiciary was laying down new principles through adjudication of legal disputes by interpreting the relevant sections of the Code of Civil Procedure. The inspiration for judicial control of public endowments came from English law which was subjected to reform in the beginning of the nineteenth century.¹⁰⁹ The

¹⁰⁷ Letter No. 638 dated 28 May 1912 from Government of Madras to the Secretary to the Government of India. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹⁰⁸ Ibid.

¹⁰⁹ Owen (n 80) 182.

provisions dealing with public trusts in the Indian Civil Code were adopted from the summary remedy envisaged under the English Charities Procedure Act 1812, popularly known as Sir Samuel Romilly's Act.¹¹⁰ The Code of Civil Procedure Act 1859 did not contain any clause on the administration of public trusts of a religious or charitable nature. Such a clause was added to the Code of Civil Procedure of 1877 for the first time. Section 539 of the Code provided limited relief for the administration of public trusts. This section was re-enacted in the Code of Civil Procedure of 1882 in the form of section 92 of the Code. The various Indian High Courts held divergent opinions on the interpretation of this section, which provided for the appointment of a new trustee in case the existing trustee failed to exercise his duties or embezzled the trust funds. Most of the High Courts held that the power to appoint a new trustee necessarily involved the power to remove an old trustee. This view was adopted by the Indian Legislature in 1908 and a new clause was inserted in section 92. The power of the court to call for accounts and conduct inquiries was not mentioned in this section. However, some High Courts held such powers to be necessarily incidental to the power to remove an old trustee and appoint a new one.¹¹¹

5.5 Bills of Ibrahim Rahimtoola and Seshagiri Aiyar

So far the Government of India had opposed any change in the administrative structure of religious endowments on the ground that such change might affect the religious sentiments of native Indians. This resulted in the proposal of Sir Ibrahim in 1911. He proposed the registration and audit of 'secular endowments' of a value of

¹¹⁰ Ibid 183.

¹¹¹ *Abdur Rahim v Syed Abu Mahomed Barkat Ali Shah* (Bengal) [1927] UKPC 113.

more than Rupees 5,000 or an annual income in excess of Rupees 300. The Bill boldly proposed that the whole trust would be deemed to be charitable, unless it was shown to the satisfaction of the registrar that separate assignments for secular and religious purposes were made, whereby the religious portion might be exempted. The Government refused to accept this proposal since practically it was difficult to draw a line between religious and secular purposes 'in the circumstances' of India.¹¹² In the following year, a humble proposal came from Madras in the form of a Bill introduced by T. V. Seshagiri. This proposed the limitation of the period of committee membership to five years under the 1863 Act, and the publication of audited accounts of endowments possessing an annual income of more than Rupees 3,000. The Government raised the same objections that had been levied against Rao's Bill, which had proposed similar measures.¹¹³

Thus within a small period of thirty-four years between 1879 and 1913, eleven Bills were proposed: five by the Madras Government, one by the Bengal Government and five by private members (three from Madras and one each from Bengal and Bombay). The proponents of these Bills were trying to remedy the evil of misappropriation of endowment funds, while the Government of India and the Secretary of State for India were concerned about the religious sentiments of natives.¹¹⁴ It was argued on behalf of the Government that the policy of non-intervention in religious endowments was adopted 'after experience of the opposite

¹¹² Letter No. 4 of 1913, Judicial, dated 30 January 1913 to the Secretary of State for India, p7. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹¹³ Ibid 8.

¹¹⁴ Ibid 8.

course of intervention’ and that the policy of non-interference could only be abandoned ‘in response to clear and authoritative public demand or for the abolition of practices repugnant to modern sense of humanity’.¹¹⁵ The Government noted the schism between the ‘advanced opinion of the minority’ in favour of reform and the majority of ‘silent conservative orthodox’ who would resent official interference in religious affairs. It was observed:

*The hold of the spiritual leaders of the people over their adherents is at present far stronger than the influence exercised by those in favour of intervention, and so long as that state of affairs continues a great political risk might be incurred by any course of action which would give colour to the cry of religion in danger. Neither is it sufficient answer to urge that if the initiative comes from a private member’s Bill rather than from a Government measure such a risk may be safely faced. Situated as our Government is in this country, we cannot evade the ultimate responsibility of any legislation which may be allowed to pass, and the odium of its unpopularity will devolve upon us, even if it is not purposely directed towards us by unscrupulous opponents of our administration...*¹¹⁶

Further it was noted that the ideas of waste and misuse in the Orient were different from those of the West and it was not possible to apply ‘an exact standard of mismanagement’. The idea of audit was regarded to be plausible, but it was not possible to audit accounts by experts without giving rise to the objection of official intervention. Finally, it was noted that Hinduism was divided into various sects which see each other with suspicion, and since Government machinery was required for the holding of elections, it was not possible for the Government to dissociate itself from

¹¹⁵ Ibid 8-9.

¹¹⁶ Ibid 9 (emphasis added).

religious disputes.¹¹⁷ The same argument could also be applied to Muslims. Based on these observations, the Government of India proposed a *de novo* inquiry in Madras and Bombay, but specified that any proposal to revert to the old system of executive officers' supervision would be vetoed, though supervision through the medium of civil courts with the simplification of procedure might be deemed appropriate.¹¹⁸ However, Indian politicians were weary of the attitude of the Government of India and took the matter to the House of Commons. On 29 November 1912, Mr MacCallum Scott, member of the House of Commons, asked the Secretary of State for India whether the Government of India planned to take any action on endowments because the 1863 Act failed to 'secure the efficient management of the endowments of non Christian bodies'. He pointed out that several proposals were submitted to the Government to remedy the defects of the Act. The Secretary of State answered that he was aware of the frequent discussions on this issue, but had not received any official report or recent proposal to legislate.¹¹⁹

The raising of this issue in the House of Commons had the intended effect. The Secretary of State for India, Lord Crewe, in his letter dated 4 July 1913 stressed upon the Government of India the need to take effective measures for the enactment of a statute on this issue. He disagreed with the proposal to conduct an inquiry and recommended that the Bills of Rahimtoola and Seshagiri should be allowed to proceed. He also disagreed with the proposal that legislation on this issue should be

¹¹⁷ Ibid.

¹¹⁸ Ibid 10.

¹¹⁹ IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

uniform across India, and recommended separate legislation for various provinces. The Secretary of State for India seems to have relied upon the opinion of one Mr A. A. Baig who wrote a memo on this issue. This memo is found in the file containing documents on this issue. However, any official or non-official designation of Mr Baig, who appeared to be an Indian Muslim by name, is not mentioned.¹²⁰ The Government of India contested these views in its reply and argued that the principles of policy towards religious trusts had been consistently followed for a long period of time and must be consistent all over India.¹²¹ The Secretary of State agreed but urged that an action should be taken by March 1914.¹²² The Viceroy of India assured that the conclusions of the Government of India would be submitted by March.¹²³ This issue was raised in the House of Commons again on 17 March 1914. Sir J. D. Rees asked the Government whether the Indian Government proposed to legislate in order to stop the mismanagement of religious endowments. The Government replied that the Indian Government was investigating the issue.¹²⁴

It is worth noting that there was no difference of opinion between Hindus and Muslims on this issue. Muslim leaders regarded passing of the Mussalman Wakf Validating Act 1913 as a great success. Encouraged by this success, Maulana Shibli Numani diverted his attention to public awqāf. He suggested the formation of a small

¹²⁰ IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹²¹ Government of India's letter dated 23 October 1913. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹²² Letter dated 4 December 1913. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹²³ Copy of Telegram from Viceroy dated 17 January 1914. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹²⁴ IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

committee in order to consider the issue of the misuse of waqf properties and recommended that by following the example of previous Islamic governments, wherein a special officer was designated to supervise the awqāf, such an official should be appointed by the Government on the recommendation of the Muslim community. In February 1914, he submitted a memorial with the Government on this issue.¹²⁵ Another contemporary religious leader, Ashraf Ali Thānwī, who was also a leading scholar of the Deoband *madrasa*, also issued a *fatwā* on this issue. It stated that in the absence of a Muslim ruler or *qāḍī*, the Muslim community should remove a dishonest *mutawallī*, and if they were unable to do so, they were bound to request the ruling authority of the time to appoint an honest *mutawallī*.¹²⁶

6. From Central and General to Provincial and Special Legislation

Despite being under pressure from not only the Hindu and Muslim political leadership, but also from the Secretary of State for India, the Indian Government was not prepared to change its cherished, age old policy of non intervention in religious endowments. However, it soon appeared that the Government could hardly ignore the twofold pressure. Therefore, a conference was organized in order to explore the views of Indians on this issue. The conference on Religious Endowments was held in Delhi on 16 March 1914. There were seven Muslims amongst the twenty-six members of

¹²⁵ MSS Nadawī, *Ḥayāt e Shiblī* (2nd edn Ma‘ārif Dār al-Muṣanifīn 1970) 552-54.

¹²⁶ AA Thānwī, *Imdād ul Fatāwā* (2 of 5 vols, new edition, Maktaba Dār al-‘ulūm 2010) 597.

the conference.¹²⁷ The participants in the conference considered following seven issues:

- i. Whether the time has come to reconsider the policy of the 1863 Act?
- ii. If yes, whether the legislative change should take place at central or provincial level?
- iii. Whether it was possible to differentiate between secular and religious endowments with respect to their control?
- iv. Whether there should be an obligation to publish audited accounts?
- v. Whether the constitution of committees under the 1863 Act be changed eg limiting the period of membership?
- vi. Can further facilities be offered under the Code of Civil Procedure for the institution of proceedings of enquiry?
- vii. Are there any other directions in which change is desirable?

Local governments were particularly asked to ensure the representatives of ‘more old fashioned and orthodox sentiments’ in order to ascertain the views of less articulate sections of interested persons. There was a general feeling in favour of change, though the participants held different views as to the extent and nature of change. The majority of Hindu and Muslim participants agreed that it was not possible to draw a distinction between secular and religious endowments.

¹²⁷ Nawab Abdul Majid Khan, Nawab Syed Nawab Ali Choudhri, Syed Nurul Huda, Fazl-i-Hussain, Sir Ibrahim Rahimtoola, Sahibzada Abdul Wahed Khan, and Khan Bahadur Mir Asad Ali Khan. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

The Government of India realized that it could no longer delay any legal change regarding charitable and religious endowments, but noted the ‘necessity for extreme caution’ in this respect because the issue might excite ‘fanatical feelings’. Since there was a difference of opinion regarding the extent of official control, judicial rather than executive control of endowments was proposed. This is because proceedings in the civil courts had the advantage that it would enable the Government ‘to gauge further the public interest in these matters’.¹²⁸ The official members noted that educated Indians required the imposition of certain obligations upon trustees and modifications in the constitution of committees appointed under the 1863 Act, but it was likely to provoke resentment amongst the orthodox who constituted a majority. Therefore, it was proposed to delegate all legislation to the Provincial Councils so that each province might take measures most appropriate to itself.¹²⁹ The following points were agreed:

- i. Definite obligation to publish audited accounts should be imposed by law;
- ii. Small trusts should be exempted from this obligation, but there was a difference of opinion as to the annual income which may constitute a small trust starting from Rupees 100 to 5,000.
- iii. A majority favoured the appointment of auditors by the courts and some by committees.
- iv. There was agreement that the membership of committees under the 1863 Act should not be for life but for a shorter term eg five years.

¹²⁸ Letter No. 19 of 1914 Government of India Home Department, Judicial dated 23 July 1914, p3. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹²⁹ Ibid 2.

- v. By a system of registration or otherwise, all particulars regarding the conditions of trusts should be made accessible to the public.¹³⁰

The Secretary of State for India, Lord Crewe, gave his assent for the preparation of a statute according to the proposals of the Indian Government by the Imperial Legislative Council.¹³¹ The Charitable and Religious Trusts Bill 1914 was prepared and sent to the Secretary of State in London. However, at the outbreak of World War I, the Indian Government, after realizing the sensitive nature of the issue, postponed the legislation.¹³² Meanwhile private initiative was taken in certain provinces for the protection of awqāf. For instance, *Anjuman-i-Mohāfiz-i-Awqāf* (Association for the protection of awqāf) was established by a practicing lawyer, Syed Mohammad Meer, in Delhi in 1915 for ‘the restoration, preservation, protection and management of wakf properties, mosques and graveyards.’¹³³

6.1 The Charitable and Religious Trusts Act 1920

After the end of World War I, the Charitable and Religious Trusts Bill was presented in the Imperial Legislative Council. The Statement of Objects and Reasons of the Bill

¹³⁰ Ibid 4.

¹³¹ Letter No. 208 to the Governor General of India in Council dated 13 November 1914. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹³² Letter No. 23 dated 29 Oct 1915 to the Secretary of State for India from Government of India, Home Department. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹³³ *Qabrastan* (graveyard) Committee of 15 Muslims of Dehli for the management of a new graveyard in Dehli was established under an agreement dated 20 October 1924 entered between the Chief Commissioner on behalf of the Government and a Committee representing the Muslims of Dehli. Report on the Delhi Masajid and the Delhi Muslim Wakfs Bills (Government of India 1942) 6. Similar efforts were also made by Hindus for the protection of Hindu endowments. For instance, *Dharma Rakshana Sabha* tried to protect Hindu religious endowments in Madras. Mudaliar (n 29) 31.

noted that since 1866 there had been constant complaints about the misappropriation of funds of endowments, and that several private Bills had proposed remedial mechanisms. However, the Bill did not deviate from the old policy of the Government of India, proposing improvement in judicial control, but not providing for administrative control. Under the Bill, any person interested in a trust might have applied to the District Judge for an order directing the trustee to furnish him with information regarding the nature, object, value, condition, management and income of the trust. The judge could also direct that the accounts of the trust be examined and audited. Failure to comply with such an order would have constituted a breach of trust. The Bill contained only general principles, and specific rules related to the committees were left to the Provincial Legislatures.¹³⁴

While commenting on the Bill, the Lieutenant-Governor of the Punjab noted that the issue of charitable and religious trusts in the Punjab was of small importance and was limited to rural areas. He noted that these trusts were mostly controlled by religious men, *Pīr* and *Mahant*, who were loyal to the Government during the War. This view was supported by the judicial records which showed that no important suits relating to the management of any trust or endowment were filed during the preceding few years. He observed that although the Provincial Muslim League and *Anjuman-i-Islamia* (Muslim Association) supported the Bill, they were the representatives of urban areas. Therefore, he thought that the introduction of the Act would sow distrust amongst the rural population about the intentions of the Government, and recommended that the application of the Act in the Punjab should be optional. The

¹³⁴ IOR/L/PJ/6/1627, File 6265: Sep 1919-Jul 1920.

Chief Commissioner of Delhi shared these views. This suggestion was accepted and section 1(2) empowered the Governor General to exempt any Province, area, trust, or class of trust from the application of the Act. The Legal Remembrancer to the Punjab Government condemned the Bill in strong words by regarding it as ‘an engine of tyranny and oppression’, which was against the ‘wise and statesmanlike policy hitherto adopted on the subject’.¹³⁵ These views were in sharp contrast to the views expressed by Sir Umar Hayat Khan, member of the Legislative Council from the Punjab, who regarded the Bill in accordance with Muhammadan law except that it did not ‘go far enough’.¹³⁶ The Lieutenant-Governor of the United Province, though agreed with the principles of the Bill, recommended its deferral to a future Council since there were apprehensions in some quarters about its political effect. The Chief Commissioner of Delhi agreed with these views. However, the Lieutenant-Governor of Madras noted that the Bill did not meet the great and longstanding demand for reform. The Governments of Bihar and Orissa shared these views. Most critics required a clear definition of the term ‘interest’ in the endowment. The Government of Bengal supported the Bill and noted that the definition of ‘interest’ would be analogous to section 92 of the Civil Procedure Code 1908.¹³⁷

In the end, the Act proposed weak measures for the administration of charitable and religious trusts. First, the information as to the nature and objects of the trust were to be provided to the applicant and not to the court. Therefore, in case of

¹³⁵ Ibid.

¹³⁶ *PILC*, dated 3 Sep 1919, IOR/L/PJ/6/1627, File 6265: Sep 1919-Jul 1920.

¹³⁷ IOR/L/PJ/6/1627, File 6265: Sep 1919-Jul 1920.

the provision of wrong information no penalty could be incurred, since section 171 of the Indian Penal Code 1860 applied only to the submission of wrong information to the courts. Second, the courts could order that the accounts of the trust be examined and audited. But the Act did not provide any consequences for any discrepancies in the accounts. The only penalty provided under the Act was that in case the trustee failed to provide the information ordered by a court without any reasonable excuse, he would be regarded to have committed a breach of trust and could be prosecuted under section 92 of the Code of Civil Procedure 1908.¹³⁸ Third, courts were not authorised under the Act to determine the question of title of the property or the existence of the trust. The only positive contribution of the Act, apart from the expeditious summary procedure with no right to appeal, was that it did not require the consent of the Advocate General in order to file a suit. It provided that the court might direct the defendant to furnish security for costs incurred by the plaintiff if the suit was filed under section 14 of the Religious Endowments Act 1863 or section 92 of the Civil Procedure Code 1908. These measures were taken in order to encourage and facilitate the public 'to secure the honest management' of trusts despite there being concern about frivolous litigation regarding such trusts.¹³⁹ Only one appeal under the Act went to the Privy Council.¹⁴⁰

¹³⁸ In November 1925, the 1863 Act was amended in order to empower lower courts to exercise powers under this Act. The Religious Endowments (Amendment) Act 1925. IOR/L/PJ/6/1911, File 2527: Aug-Oct 1925.

¹³⁹ Letter No. 23 dated 29 Oct 1915 to the Secretary of State for India from Government of India Home Department and Memo dated 4 November 1915. IOR/L/PJ/6/1221, File 629: 27 Nov 1912-28 Jan 1916.

¹⁴⁰ *Pandit Parma Nanad v Nihal Chand* [1938] 40 BLR 907, AIR 1938 PC 195.

6.2 The Mussalman Wakf Act 1923

After a protracted struggle spanning more than half a century, the Charitable and Religious Trusts Act 1920 was a disappointment. Therefore, in a short period of time, a new legislative proposal was launched for the better management of endowments. Meanwhile as a result of constitutional reforms in 1916, a federation type of government was introduced in India and the management of religious and charitable trusts was transferred to the provincial governments. The Mussalman Waqfs Registration Bill was forwarded on 26 September 1921. The Statement of Objects and Reasons described the misuse of family waqf to defeat creditors and evade the law, along with harnessing the *mutawallīs* who by their ‘moral delinquencies, bring discredit not merely on the endowment but on the community itself’. The Bill proposed a system of compulsory registration, in order to restrain *mutawallīs* from using waqf as their private property. The proposal required the Government to appoint an officer who should inquire into the proper management of awqāf. The Central Committee was authorised to levy a ratable contribution from *mutawallīs* in order to meet the expenses of such an officer and his staff. It also proposed that the *mutawallī* should keep proper accounts and ensure their publication. Finally, the Bill proposed facilitation and simplification for the filing of suits in order to remove a delinquent *mutawallī*. The mover of the Bill, Abul Kasem from Bengal, clarified that the Bill did not propose to interfere with ‘Muhammadan law, or custom or vested interests’.¹⁴¹

The Government of India objected that the Bill gave too much power to a District Collector, which was inconsistent with the long standing policy to ‘keep their

¹⁴¹ IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929. This set of four volumes contains all the documents relating to the Wakf Act 1923.

officers entirely free from any connection with the management of these religious trusts'. The Nominated Official, H. Tonkinson opposed the Bill on similar grounds. However, one member, Hussanally from Sind, warned the Government that its opposition to the Bill would adversely affect the Muslim public opinion. These views were endorsed by another member from the Punjab, Chaudhri Shahab-ud-Din, who asserted that the misappropriation of charitable and religious endowments by *mutawallīs* was a criminal breach of trust and that it was the duty of the Government to put a stop to it. The major criticism on the Bill was made by one member from Bengal, Kabeer-ud-Din Ahmed, who argued that the current law in the form of the 1920 Act and section 92 of Code of Civil Procedure 1908 was sufficient. He highlighted the diverse opinions expressed by the local governments in their comments on the Bill.¹⁴² These views were endorsed by another member from NWFP, Abdur Rahim Khan, who noted that the Bill would give rise to a conflict between a small number of educated Muslims and orthodox 'religious heads who are worshipped by the masses'.¹⁴³ Abul Kasem, the mover of the Bill, refuted the last claim by stating that the illiterate masses were used in India to promote personal interests. He claimed that the masses would support the measures envisaged in the Bill. He was however willing to remove the clauses regarding official control. But the principles of the Bill were still opposed. The Bill was handed over to a Select Committee after the motion was passed in its favour by 41 to 30 votes.¹⁴⁴

¹⁴² Extracts from Official Report of the Legislative Assembly Debates, 15 February 1923, 2303-19, Ibid.

¹⁴³ Ibid 2320.

¹⁴⁴ Ibid 2323-25.

As could be expected, the Select Committee reduced the scope of the Bill significantly by confining it only to the rendition of the particulars of awqāf and annual accounts. All clauses regarding official supervision were removed and their number was reduced from 32 to 13. It was left to the discretion of local governments to apply the Act at whatever time or place under their jurisdiction. The proposed penalty for the *mutawallī* for failure to keep proper accounts was limited to a fine, and the proposal for imprisonment up to three months was dropped.¹⁴⁵ The operation of the Act was excluded from private awqāf as defined under section 3 of the Mussalman Wakf Validating Act 1913.¹⁴⁶ However, the Act was ambiguous on this point as clause (b) of subsection 3 of section 3 provided that the waqf created under the 1913 Act was required to be registered under certain circumstances. The actual intention of the legislature was to provide for the application of the property belonging to a private waqf for public purposes in case the beneficiaries should die out. Subsection 3 of section 3 in fact attempted to embody the principle of Islamic law that the ultimate beneficiaries of a private waqf are the poor of the community. However, the section was so badly drafted that its rationale could hardly be understood from its language.¹⁴⁷

On the issue of the Waqf Registration Bill, Muslim politicians from various Indian provinces tried to show that they were united. In reality, it exposed internal

¹⁴⁵ Extracts from Official Report of the Legislative Assembly Debates, 22 March 1923, 3893, IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

¹⁴⁶ Report of the Select Committee, Legislative Department, 15 March 1923, *ibid.*

¹⁴⁷ This clarification was provided by Maulvi Abdul Hakim, member of the UP Legislative Council, Extracts from Official Report of the United Provinces Legislative Council dated 27 February 1924, 112. IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929. This understanding was confirmed by the Madras High Court in *Haji Kadir Murthaza Hussain v Mohomed Murthuza Hussain* AIR 1943 Mad 234, [1942] 2 Mad LJ 672.

rifts in the Muslim community. One proposal was made by a Hindu member of the Legislative Council, Lala Girdharilal Agarwala, that a Muslim belonging to the different sect should be barred from filing a suit against the endowment of the other sect. This proposal was not accepted.¹⁴⁸ As we shall see later, when the issue was discussed at provincial legislatures, separate committees were established for Sunnī and Shī‘a awqāf. While the Bill was debated in the Legislative Council, a member of wealthy Bohra commercial community, who were mainly from Bombay, sent memorials to the Government in order to exempt them from the application of the Act.¹⁴⁹ The issue was also raised in the press.¹⁵⁰ Therefore, section 13 was added in the Act in order to empower local governments to exempt any section of the Mussalman community from the application of the Act. However, this exemption was not extended to them and one member of the Bohra community was criminally prosecuted and fined for failing to comply with the requirement of registration under the Mussalman Wakf Bombay (Amendment) Act 1935.¹⁵¹ One common factor in the passing of this Act with the 1913 Act and the 1920 Act was that the Law Member was a Muslim, Dr Mian Muhammad Shafi. The support of the Law Member, Sir Ali Imam, had played a vital role in the passing of the 1913 Act and the 1920 Act. The support of Dr Shafi was also important in the passing of this Act.

¹⁴⁸ Extracts from Official Report of the Legislative Assembly Debates, 22 March 1923, 3895-96, IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

¹⁴⁹ Memorial to the Governor of Bombay dated 4 September 1924; to the Secretary of State for India dated 9 January 1924; 5 September 1924 and 20 February 1925. They used their influence to raise the issue in the House of Commons through Mr Saklatvala who asked the Government whether it knew the discontent amongst the Bohra community of Bombay regarding the Wakf Act 1923 and if the Bombay government had made a final decision in this regard. IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

¹⁵⁰ *The Indian Daily Mail*, Monday 12 January 1925; Saturday 24 March 1925; Thursday 9 April 1925. Opposite views were expressed in *The Times of India*, Wednesday 14 January 1925; *The Bombay Chronicle*, Thursday 15 January 1925; Saturday 17 January 1925; Wednesday 28 January 1925.

¹⁵¹ *Ali Mohomed Adamalli v The King-Emperor* (Bombay) [1945] UKPC 30.

The next issue was to get the Wakf Act 1923 applied in various provinces. In the United Provinces, one member, Nawab Muhammad Yusuf, objected to the 1923 Act for its being against the Shariat (Islamic Law) for requiring registration of waqf and filing of accounts. The proponent of the Act, Dr Shafa‘at Ahmad Khan produced *fatāwā* from the leading Indian ‘*ulamā*’ in order to rebut this argument.¹⁵²

6.3 Provincial and Special Legislation on Waqf

The Wakf Act 1923 was a step ahead of the Charitable and Religious Trusts Act 1920. It also served as a model for legislation for public trusts belonging to Hindus and Parsis.¹⁵³ However, like its predecessor it also failed to satisfy the demand of Muslims who wanted greater control of awqāf in India. Therefore, provincial legislatures went beyond the minimum regulatory requirements of the Wakf Act 1923 after the regulation of charitable and religious endowments became a provincial subject under the constitutional scheme envisaged under the Government of India Act 1935.¹⁵⁴ The Bombay Legislature increased the powers of the courts with respect to filing of accounts, enquiries regarding the nature of the waqf, and the overall supervision and

¹⁵² Five *fatāwā* are mentioned: Moulvi Kifayat-ullah of Jamiat-ul-Ulama, Delhi; Mufti of Deoband; Kazi of Jaunpur; one from Lucknow, and one from Maulvi Sulaiman Badvi. Extracts from Official Report of the United Provinces Legislative Council dated 9 September 1924, 332. IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

¹⁵³ See the Bombay Public Trusts Registration Act 1935, and the Parsi Public Trusts Registration Act 1936.

¹⁵⁴ Item 34 List II Provincial Legislative List, Seventh Schedule, The Government of India Act 1935 [26 Geo 5 Ch 2]

control of awqāf.¹⁵⁵ In Sind, the court was empowered to suspend, remove or dismiss a *mutawallī* summarily after referring the matter to the Waqf Committee.¹⁵⁶ Bengal, United Provinces and Delhi passed separate statutes in order to provide effective control for awqāf by establishing special bodies which were vested with wider administrative powers of supervision over awqāf.¹⁵⁷ Muslim leaders wanted control over endowments not directly by government officials but through themselves. Therefore, while the proposal of government interference in religious awqāf was criticized in the United Provinces, powerful Central Boards comprising elected Muslim members were accepted. The United Provinces Waqfs Act 1936 was inspired by the Bengal Wakf Act 1934 which provided that the members of a Wakf Board and the Wakf Commissioner should be Muslim (sections 9 and 16).

The Bengal Wakf Act was a detailed statute comprising ninety-three sections. It vested the Commissioner with huge powers of investigation and supervision over awqāf (s 27) under the directions of Wakf Boards (s 28). Unlike the Wakf Act 1923, the Bengal Wakf Act also applied to family awqāf, though certain exemptions were made in order not to burden this type of waqf with undue obligations, eg audit of annual accounts. Like the Bengal Wakf Act, the UP Muslim Waqfs Act 1936 was a detailed piece of legislation comprising seventy sections and one schedule. It envisaged separate Central Boards for Sunnī and Shī‘a awqāf (s 6). These Boards were vested with powers in order to implement the proposals of the District Waqf

¹⁵⁵ The Mussalman Wakf (Bombay Amendment Act) 1935. IOR/L/PJ/7/7828.

¹⁵⁶ Section 6 of the Mussulman Waqf (Sind Amendment) Act 1935.

¹⁵⁷ The Bihar Wakfs Act 1947 was passed after the Independence of India.

Committees.¹⁵⁸ The concept of separate bodies for Sunnī and Shī‘a awqāf was followed in the Delhi Muslim Wakfs Act 1943, which was also an elaborate statute comprising seventy-one sections.¹⁵⁹ However, unlike the UP Waqfs Act, it did not create an exception for the family waqf and was applied to all types of awqāf. But a family waqf (as defined under section 3 of the 1913 Act) was exempted from payment of fee to the Wakf Fund (s 56). The Majlis (Committee) for the supervision of awqāf was to be a body corporate like the Treasurer under the 1920 Act (s 5(2)) and the Board of Wakfs under the Bengal Wakf Act 1934 (s 7). These statutes were passed after a prolonged consultative process which included officials and the members of various classes as is evident by the following statement from the Report of the Select Committee of the United Provinces Legislative Council:

As soon as the Bill was referred to the Select Committee a vernacular translation of it was widely circulated for eliciting the public opinion. The opinions of 54 Muslim institutions and 315 individuals were received. These have been classified in four printed volumes. In addition the voluminous written opinion referred to above which we have considered we met from 15th to 20th July, 1935, summoned 33 witnesses for examination out of whom only 20 turned up. These witnesses belong to the Ulema class, both Shias and Sunnis, although there were certain prominent mutawallis and leading public men amongst them.¹⁶⁰

¹⁵⁸ Above these Committees, the Department of Waqfs was proposed as a self-supporting body which could levy tax on awqāf under the control of Central Boards. However, this proposal was later dropped. Statement of Objects and Reasons. IOR/L/PJ/7/1227.

¹⁵⁹ In addition three sets of rules: General; Shia Majlis-e-*aukaf* and Sunni Majlis-e-*aukaf* 1943 were also provided. IOR/V/930/4. Two more sections were added in the Act in 1947 in order to empower the Majlis (committee) and Nazir (supervisor) to call witnesses and impose a penalty on a *mutwallī* who failed to comply with certain provisions of the Act. IOR/L/PJ/4544.

¹⁶⁰ Para 4 of the Report of Select Committee referred in Extract from the Proceeding of the UP Legislative Council, dated 9 November 1936, 2. IOR/L/PJ/6/1773, File 6564: Oct 1921-Nov 1929.

Special statutes were passed for certain endowments which could not be dealt with under the general law such as the Durgah Khwajah Saheb Act 1936 and the Prince of Arcot Endowments Act 1922. The latter Act provided a scheme of administration for the endowments under the control of the Prince of Arcot. Such endowments included several mosques and tombs which were supported by a number of properties spread across different provinces.

7. Conclusion: Legal Pragmatism

The story of the development of the regulatory framework for awqāf in British India exposes the limitations of the colonial state. It shows that colonial rule in India was not simply based on raw power. The colonial state took the feelings and opinions of its subjects into account in making its laws and avoided any legislation which was likely to draw a negative public reaction. On the relationship between the State and religious endowments, the colonial administrators held different views. The State policy on this issue represented a synthesis of these views. The opinion of Muslims on this issue was also divided. There were sharp differences between the minority urban, educated ‘modern’ class, and the majority, rural illiterate ‘backward’ class. Colonial administrators were aware of these differences and did not take any step at the instance of the vocal minority, which might not have been acceptable by the docile orthodox majority.

The colonial state preferred law making by courts because it helped gauge public reaction, and the final decision, unlike with a statute, did not appear at once. The legal issues were subjected to debates at both public and official levels. The final decision reflected the views of various stakeholders. Case law on this issue shows that

judges of the Indian High Courts imported principles of English law to India while adjudicating waqf cases. For example, a dedication for the purpose of maintaining a tomb was regarded invalid in English law under the doctrine of perpetuities.¹⁶¹ The Madras High Court applied this principle in one case in 1894. It was held that a waqf for the maintenance of a tomb and annual offering of *fāteḥa* ceremony was invalid for contravening the rule against perpetuities.¹⁶² This case was followed by Badr ud-din Tyabji in *Zooleka Bibi v Syed Zynul Abedin* in 1904.¹⁶³ This finding is in conformity with the thesis of Carol Appadurai Breckenridge who argues that English trust law was superimposed upon Hindu religious endowments in order to make law ‘predictable, regular and uniform’.¹⁶⁴ Mitra Sharafi comes to the similar conclusion in her study on Parsi temples.¹⁶⁵ The Privy Council in several cases dealt with the awqāf in favour of tombs, shrines, and religious ceremonies such as performance of *fāteḥa* and recitation.¹⁶⁶ But in no case the validity of such awqāf was questioned. This is in sharp contrast to the attitude of the Privy Council towards family awqāf. The Privy Council exercised extreme caution especially after its decision in the *Abul Fata* and

¹⁶¹ Under English law, non-charitable purpose trusts are usually void because of two reasons: one, perpetuity and second, because there is no beneficiary who can enforce them. *Thomson v Shakespear* [1860] 1 De G F & J 399, 45 ER 413; *Carne v Long* [1860] 2 De G F & J 75, 80, 45 ER 550, 552. Even in exceptional circumstances where such purpose trusts are recognised, they are restricted to the perpetuity period. *Re Hooper* [1932] 1Ch 38.

¹⁶² *Kaliloola Rakib v Nuseerudden Sahib* [1894] ILR 18 Mad 201.

¹⁶³ [1904] 6 BLR 1058.

¹⁶⁴ CA Breckenridge, *The Srī Mīnākṣi Sundarīśvarar Temple: Worship and Endowments in South India, 1833-1925* (PhD Thesis, Wisconsin--Madison 1976) 361-62. For full discussion of this point see chapter VII ‘The Religious Endowments Act, XX of 1863’ 347-69; and chapter IX ‘Conflicts Over Honors and Control: An Appeal to the Courts’ 409-57.

¹⁶⁵ MJ Sharafi, *Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887--1925* (PhD Thesis, Princeton University 2006) 139.

¹⁶⁶ *Mutu K. A. Ramannadan Chettiar v Vava Levvai Marakayar* (Madras) [1916] UKPC 107, 44 IA 21 (for *fāteḥa*); *Mirza Sajjad Husain v Nawab Wazir Ali Khan* (Oudh) [1912] UKPC 41 (in favour of a tomb); *Sain Maule Shah v Ghane Shah* (Lahore) [1938] UKPC 29 (in favour of a shrine).

the subsequent protests against it. It shows that both the colonial executive and superior judiciary adopted a pragmatic approach towards religious endowments.¹⁶⁷

This chapter has shown how the regulatory framework for awqāf was shaped by the interaction, negotiation, contestation and collaboration between the colonial administrators and Indian Muslims. Despite having unequal bargaining power, each group played an active role in the making and shaping of the law regarding the management and supervision of awqāf. This chapter showed the interaction primarily between Muslim politicians and the colonial state. The next chapter critically analyses the development of legal principles under Anglo-Muhammadan law by showing how shares and securities were incorporated into the subject matter of waqf. We shall see that the process of negotiation on this issue included not only Muslim politicians, but also Muslim judges, lawyers, legal commentators and most importantly, '*ulamā*'. This will also show that how the judiciary played a vital role in the development of Anglo-Muhammadan law through adjudication. This chapter has also shown that the processes of adjudication and legislation went hand in hand and complemented each other. But it was adjudication which played the leading role. Legislation only stepped in when courts failed to provide a satisfactory solution to a certain legal problem. Indeed, this is a common theme that runs across chapters 2 and 3. The next chapter shows that the simultaneous application of judicial interpretation of these statutes on waqf and Islamic law resulted in a unique phenomenon, which should be called '*judicial ijtihād*'—extension in legal rules under judicial precedent.

¹⁶⁷ The same was not the case with Chinese endowments. SP-Y Chung, 'Chinese Tong as British Trust: Institutional Collisions and Legal Disputes in Urban Hong Kong, 1860s--1980s' (2010) 44 *Modern Asian Studies* 1409.

Chapter 4

Adoption of Change under Anglo-Muhammadan Law: Case Study of the Waqf of Shares and Securities

Law has a spurious appearance of autonomy thanks to its notorious conservatism. It is conservative because a law is an observed regularity: if the regularity disappears there is no law, whence the fact that legal change has everywhere tended to take place in disguise.¹ Patricia Crone

1. Introduction

Like the English trust, the waqf developed primarily for the management of immovable property. Classical Islamic law recognised some financial instruments in the form of *hawāla* (bill for the transfer of the payment of debt) and *suftaja* (bill of credit), but shares of companies and securities issued by the state were a new form of property, which were not dealt with under classical Islamic legal texts. Similarly, impersonal commercial institutions in the form of joint stock companies, financial institutions and cooperative societies were also new as was the impersonal state as a nexus of organisations. How did Muslims and Islamic law respond to these institutional changes? The process by which shares and securities were adopted as a valid subject matter under waqf law provides an excellent case study for exploring this question.

¹ P Crone, 'Weber, Islamic Law, and the Rise of Capitalism' in TE Huff and W Schluchter (eds), *Max Weber & Islam* (Transaction Publishers 1999) 256.

This chapter investigates the historical legal process by which shares and securities along with similar types of incorporeal property were incorporated as a valid subject matter of waqf in British India. It shows that Anglo-Muhammadan law responded to social change by engaging with various groups who held divergent views about the nature of Islamic law, its interpretation and capacity to accommodate change. The British judges presumed that Islamic law was conservative by its very nature because of its religious foundations. They did not allow recourse to the original sources of Islamic law and rigidly applied the translations of selected classical legal texts as the ‘codes of law’. Muslim legal commentators challenged these views and practices. They argued that Islamic law responds to social change by referring to the principles of Islamic law such as *maṣlaḥa* (public interest or good) and *istiḥṣān* (juristic preference). The *fatāwā* (legal opinions) of ‘*ulamā*’ and lobbying by Muslim politicians supplemented these efforts from outside the judicial discourse. The new legal system facilitated a discourse between various stakeholders and reflected the diversity in their views.

2. Classical Islamic Waqf Law, and Shares and Securities

As shares and securities were a modern development, classical Islamic legal texts were silent in regard to their legitimacy as the subject matter of waqf. Shares and securities resembled money. Therefore, by making an analogy with money Muslim jurists raised the question as to whether the waqf of money was valid.

The Ḥanafī principles of waqf on this point seem to have evolved gradually. Abū Ḥanīfa confined the waqf to immovable property only because he regarded waqf as analogous to temporary lending for use (*‘āriya*). Therefore, objects such as money

and food items were not the valid subjects of waqf, because they could not be used without being entirely consumed. His senior disciple, Abū Yūsuf took one step forward and regarded the waqf of movables attached to land eg agricultural tools as valid. But the waqf of other movables, especially consumables, was not allowed because perpetuity was a fundamental condition of a waqf. Therefore, only land and accessories attached to it could be the valid subject matter of waqf. The waqf of military horses and weapons was validated as an exception to the general rule upon the authority of a tradition of the Prophet. Muḥammad al-Shaybānī, second disciple of Abū Ḥanīfa, after agreeing with both Abū Ḥanīfa and Abū Yūsuf extended the subject matter of waqf to movable property if it was supported by customary practice. Although Muḥammad al-Shaybānī did not explicitly validate the waqf of money, he expanded the movable category to an extent that any moveable property including money could be appropriated as waqf.²

It was the third disciple of Abū Ḥanīfa, Zufar famous for dissenting from the views of the founders of the Ḥanafī school on various issues, who explicitly supported the waqf of money and other consumables. The sole objection to such waqf, at this stage, was on the basis of perpetuity. As perpetuity is the fundamental condition of the waqf, it could not be fulfilled in the case of money and consumables. Therefore, Zufar was asked how such a waqf could be perpetual? He replied that perpetuity could be achieved by investing the money in a *muḍāraba* (commenda) partnership and applying the profit for the purposes of the waqf. He argued that where the subject

² Al-Marghīnānī, *Al-Hidāya* (Muḥammad ‘Adnān Darwīsh ed, 3 of 4 vols, Dār al-Arqam 1997) 17-18; Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr ‘alā al-Hidāya* (‘Abd al-Razzāq Ghālib Mahdī ed, 6 of 10 vols, Dār al-Kutub al-‘Ilmiyya 2003) 202-05.

matter of waqf consists of other movables, they might be sold and the price in money might be invested similarly.³

The classical jurists appear to have contented themselves with this overly simplified reply, and the possibility of the loss of money in the commenda form of a partnership was ignored.⁴ But the loss of property could also occur in cases of the destruction of immovable property because houses or shops could fall down or agricultural land could erode. However, the chances of loss in the case of movables, and especially cash, were far higher. More importantly, perpetuity was an implied condition of a waqf, logically deduced from the tradition of the Prophet that a waqf property should not be sold, gifted or inherited. But perpetuity became the fundamental condition of a waqf because it distinguished it from the ordinary charity (*ṣadaqa*) wherein the donation could be consumed by the donee.

The translation of the *Hidāya* stated the opinions of Abū Yūsuf and Muḥammad al-Shaybānī and clarified that the latter's view was accepted by the majority of Ḥanafī jurists. The difference of opinion between these jurists stemmed from their different application of analogy. The waqf of movables was invalid

³ Ibn al-Humām (n 2) 203; Al-Shaykh Nizām, *Fatāwā al-‘Ālamgīriyya* (2 of 4 vols, Nawal Kishawr 1865) 963. The opinion of another leading jurist, al-Zuhrī, expressed in the commentary of *Ṣaḥīḥ al-Bukhārī* supporting the view of Zufar is also quoted in the literature. Badr al-Dīn Maḥmūd ibn Aḥmad ‘Aynī, *Umdat al-qārī: Sharḥ Ṣaḥīḥ al-Bukhārī* (Dār Iḥyā’ al-Turāth al-‘Arabī 1980). For its translation in English see Dr A. al-Ma'mūn Suhrawardy, 'The Waqf of Moveables' (1911) 7 n.s. *Journal of the Asiatic Society of Bengal* 323, 354.

⁴ In the Ottoman Empire, in practice the money of a cash waqf was rarely invested in business rather it was lent on a fixed interest though under the guise of various legal devices. M Çizakça, *A Comparative Evolution of Business Partnerships: The Islamic World and Europe, with Specific Reference to the Ottoman Archives* (Brill 1996) 131-34. The euphemism for interest in the seventeenth century court cases in Istanbul was 'the price of broad cloth'. T Kuran (ed), *Mahkeme kayıtları Işığında 17. yüzyıl İstanbul'unda sosyo-ekonomik yaşam (Social and Economic Life in the Seventeenth Century Istanbul)* 1 of 12 vols (1 Türkiye İş Bankası 2010) 50.

because it could not last forever. Therefore, a waqf of movables that was not exempted specifically by the tradition of the Prophet was invalid. Muḥammad al-Shaybānī argues that this analogy can be abandoned on account of utility (*istiḥsān*) that exists if there is a custom to make waqf out of certain movables. This view of Muḥammad al-Shaybānī is contrasted with that of Shāfi‘ī who regards as lawful a waqf of everything which can be used without the destruction of its substance, or everything which was lawfully saleable. Shāfi‘ī argues that such things resemble land, horses and arms. The author of the *Hidāya*, however, refutes Shāfi‘ī’s opinion on the basis that analogy of land, horses and arms cannot be extended to other movables if their usage as waqf is not supported either by the tradition of the Prophet or utility.⁵ The translation of the *Fatāwā al-‘Ālamgīriyya* described the position of three Ḥanafī jurists and pointed out that though a waqf of consumables such as gold, silver (*dirham* and *dīnār*), drinkables and clothes is invalid, it is validated at places where it is customary to make a waqf of such things.⁶

3. Waqf of Shares and Securities under Anglo-Muhammadan Law

Judges in the Anglo-Indian Courts found diversity of opinion in Islamic legal texts confusing. Though this plurality of views somewhat resembled the conflicting case law under the English legal system, it confounded the British judges who were not familiar with the Islamic legal tradition and the indigenous judicial system. During the early days of British rule in India, Muslim legal experts (*mawlawīs*) were employed

⁵ C Hamilton, *The Hedaya, or Guide; A Commentary on the Mussulman Laws* (2 of 4 vols, T. Bensley 1791) 344. The original text does not use the word ‘*maṣlaḥa* or *istiḥsān*’, which could be translated as utility. ‘Utility’ here is used in the sense of usage or custom.

⁶ NBE Baillie, *A Digest of Moohummudan Law* (2nd edn Smith, Elder & Co 1865) 571.

by courts to assist judges. This was in the spirit of Islamic law, wherein a *qāḍī* (judge) was assisted by a *muftī* (jurisconsult) as a legal expert.⁷ But the posts of such experts were abolished in 1864 and English judges decided cases on the bases of the English translations of classical legal texts. A *qāḍī* under Islamic law was also guided by the principles of adjudication (*adab al-qāḍī*) in order to resolve disputes by taking into account not only the diversity of legal opinions but also the circumstances of each case.⁸ While the principles of *adab al-qāḍī* did not go unnoticed by legal commentators and judges,⁹ the Anglo-Indian Courts were part of a hierarchal system within an expanding empire that prioritised governance more than replicating the role of a *qāḍī*. Law in the British Empire was a tool of political organisation rather than a means to fulfil the will of God. Therefore, consistency and certainty of law were more important than the religious or customary susceptibilities of native Indians who were governed by the law.¹⁰ Thus the doctrine of precedent became an important feature of Anglo-Muhammadan law. This was one of the fundamental changes which were brought into the Islamic legal system by the British.¹¹

⁷ MK Masud, B Messick and DS Powers, 'Muftis, Fatwas, and Islamic Legal Interpretation' in MK Masud, B Messick and DS Powers (eds), *Islamic Legal Interpretation* (Harvard University Press 1996) 8-15.

⁸ The *Fatāwā al-Ālamgīriyya* contained a full chapter on *adab al-qāḍī*. Al-Shaykh Nizām, *Fatāwā al-Ālamgīriyya* (3 of 4 vols, Nawal Kishawr 1865) 310-438. Baillie did not include this chapter in his translation of the extracts of the *Fatāwā al-Ālamgīriyya*. Hamilton's *Hedaya* provides the translation of this chapter. Hamilton, Book XX (n 5) 612-64.

⁹ The Privy Council observed that the chapter on *adab al-qāḍī* 'clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases.' *Hamira Bibi v Zubaida Bibi* (Allahabad) [1916] UKPC 81.

¹⁰ Macaulay famously laid down the principle during his speech on the Bill which became the Charter Act 1833, 'uniformity where you can have it—diversity where you must have it—but in all cases certainty.' Hansard's Debates, 3rd series, vol xix (TC Hansard 1833) 533.

¹¹ The other changes are described as the transformation of Islamic law into the state law that was administered by the extra-social agency, independent of socially grounded Muslim jurists who

Judges in the British Indian Courts had to decide three main questions regarding the waqf of shares and securities: first, whether such a waqf could be perpetual, as perpetuity is the fundamental condition of a waqf; second, whether such a waqf was invalid because of the involvement of interest (*ribā*) in it; and, third, whether Islamic law was capable of accommodating change by including new types of property under the subject matter of a waqf.

The traditional juristic answer to the first question could be that the perpetuity of a waqf does not depend on the perpetuity of its subject matter. As shares are like money, and waqf money could be invested or lent, likewise a waqf of shares is valid. Secondly, money could be invested in immovable property and in the case of other types of movable property, it could be sold and proceeds could be invested either in business or immovable property.¹² So far as the prohibition of interest was concerned, it could be avoided by using stratagems that are regarded as valid by the Ḥanafī school.¹³ The issue of the accommodation of change under Islamic law was a bit more complicated because of the doctrine of the closure of the doors of *ijtihād*.¹⁴ Muslim

previously played a pivotal role in the Islamic legal system. WB Hallaq, *An Introduction to Islamic Law* (CUP 2009) 86.

¹² The earliest reported case involving cash is *Mirzahee Khanum* [1843] Fulton 341. A Mahommedan lady is said to have left a sum of Rupees 3,000 to her executor in trust to support a certain mosque. The court held that it was not the kind of trust intended to be handed over to the official trustee. No further details are reported other than the court's ruling: 'The trust is of an objectionable nature and not one in which the Court will act.'

¹³ S Horii, 'Reconsideration of Legal Devices (*Ḥiyal*) in Islamic Jurisprudence: The Ḥanafī's and Their "Exits" (*Makhārij*)' (2002) 9 *Islamic Law and Society* 312 (arguing that legal devices provided solutions drawn from jurisprudence in accordance with the spirit of the law).

¹⁴ *Ijtihād* is the maximum exertion of mental energies in order to discover legal principles. It is argued that in the ninth century, jurists felt that *Fiqh* attained a level of maturity where all essential questions had been answered. Future activity was confined to the elaboration and interpretation of already settled principles. WB Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 *International Journal of Middle East Studies* 3. Also see discussion in the Introduction of the Thesis under subheading 4.

legal commentators and judges argued that Islamic law was capable of accommodating change. This assertion was not accepted by non-Muslim legal commentators and judges who doubted that, given its religious nature, Islamic law could respond to social change. The legal discourse surrounding these issues is discussed in the following paragraphs.

The starting point in this debate was the judgment of the Calcutta High Court in 1881. Wilson J refused to accept the validity of shares as the subject of waqf in *Fatima Bibi v Ariff Ismailjee Bham*.¹⁵ He held that the right of shareholder in limited liability companies is a right to a share in the form of dividends in the profits of the business of the company. According to him, this type of property was a modern development and in such cases the old texts could only be applied by way of analogy. He found that the classical texts did not allow money to be a valid subject of waqf because it was perishable. Therefore, shares, being analogous to money, could not be a valid subject matter of a waqf. He held:

But there does not seem to me much difficulty in arriving at a conclusion. Land, according to all the authorities, may be appropriated. And the power has been, it is universally agreed, extended to certain other kinds of property, though the exact degree of the extension is a matter in difference among the authorities. But it is agreed that it does not apply to such things as perish in the using, under which head money appears to be included. And if money cannot be appropriated, it seems to me clear that the possibility of receiving money hereafter in the form of dividends cannot be.¹⁶

¹⁵ [1881] 9 CLR 66.

¹⁶ Ibid.

This was a clear and simple negation of the waqf of money and shares of limited liability companies on the basis of textual authority. However, this conclusion was drawn without entering into the analysis of those texts and the juristic discourse surrounding this issue. The possibility of the investment of the proceeds from such shares was not explored. In fact the learned judge assumed that the dividends rather than shares were subjected to waqf. Such issues as usage and customary practice were not given even a passing reference. This, however, was only the beginning of the legal controversy surrounding the waqf of this new form of property, which was to last for decades before a satisfactory answer could be found.

3.1 Perpetuity

Syed Ameer Ali in his *Tagore Law Lectures of 1884* and the treatise of 1892 explained the Ḥanafī notion of the waqf of money and other movable property. He argued that the validity of a waqf does not depend on the nature of the property, but on the probability or presumption of permanent benefit derived from it by any mode of dealing of which it is capable, or by converting it into something else.¹⁷ He then provided translations of various Ḥanafī authorities allowing the waqf of movables and providing that the opinion of Muḥammad al-Shaybānī was given preference by the majority of Ḥanafī jurists.¹⁸ Based on these authorities, Ameer Ali criticised the

¹⁷ SA Ali, *Tagore Law Lectures—1884 The Law relating to Gifts, Trusts, and Testamentary Dispositions among the Mahommedans* (Thacker, Spink & Co 1885) 212-18; SA Ali, *Mahommedan Law* (Law Publishing Company 1976 (first published in 1892)) 246-57.

¹⁸ Ali, *Mahommedan Law* (n 17) 247-54.

judgment in *Fatima Bibee*. He argued that a waqf of government securities, shares in companies, debentures and other stocks was perfectly lawful and valid.¹⁹

He also tried to justify the reason for some Ḥanafī jurists' opposition to the validity of movables as waqf. This, according to him, was due to the primitive and archaic conditions of the society, and was based on the notion of perpetuity in waqf, which could hardly be availed in the case of movables in those days. However, as the society progressed and developed commerce, it was universally recognised that the waqf of everything which was in usage and customary in a particular locality was valid. Ameer Ali, being aware of the strict method of proof of a custom under English law,²⁰ considered it appropriate to clarify that usage or custom did not mean in the English sense of the term and thus did not require proof under the rules of English law.²¹ However, at the same time he did not argue for the application of Islamic law criteria to determine the existence of a valid custom. Rather he contended that the court was required to take into account two things: first whether the article dedicated was capable of yielding permanent benefit by any mode of dealing which was usual among mankind; and second whether the waqf of such object was recognised or had become common among the people of the place where the dedication was made. Even if it was uncommon but it fulfilled the first condition, the court had unquestioned

¹⁹ Ibid 255-56.

²⁰ See Chapter 2 (n 143).

²¹ See Chapter 2 (n 144).

authority to validate it.²² This clearly shows that Ameer Ali was eager to extend the subject matter of waqf even when it was not supported by the customary practice.²³

Taking into account the authorities produced by Ameer Ali, the Calcutta High Court dissented from the judgment in the *Fatima Bibee in Bakar Ali v Abu Sayid Khan*.²⁴ The Court reviewed various authorities and considered the view of Zufar on the validity of the waqf of money. It was also noted that the opinions of Abū Yūsuf as well as of the author of the *Hidāya* were against such an appropriation. Although Banerji and Aikman JJ found this conflict between various authorities bewildering, they decided in favour of the waqf of money. However, it was clear that this was not the end of the legal controversy surrounding the waqf of shares and securities as was evident from the last paragraph of this judgment:

The decision of the question is not by any means free from difficulty; but we are of opinion that the preponderance of authority is in favour of the view that such an endowment is good, and this view is reconcilable with the principle that perpetuity is a necessary condition of a valid waqf...²⁵

Wilson's *Anglo-Muhammadan Law*, which regarded the waqf of shares and securities to be the better opinion, was also relied upon in this judgment. However, Wilson

²² Ali, *Mahomedan Law* (n 17) 256-57.

²³ It is interesting to contrast Ameer Ali's views with the liberal approach taken by Abū Sa'ūd in the sixteenth century Ottoman Empire. Abū Sa'ūd supported the cash waqf by arguing that it was valid because Ḥanafī Imām Muḥammad al-Shaybānī validated the waqf of movables in cases where it was customary practice to establish such awāqf. See MS Risale fī vakfī'n nukud/Ebūs-Suud Muhammed B. Muhammed b. Mustafa El-Imadi, location, BAGDATLIVEHBI 477, Suleymāniyya Library, Istanbul.

²⁴ [1902] ILR 24 All 190.

²⁵ Ibid. Earlier in an unreported case *Sakina Khanam v Laddan Sahiba*, the *Fatima Bibee* case was dissented based on Ameer Ali's treatise. This case is said to be decided in 1902 by Pratt and Geidt JJ in *Kulsoom Bibee v Golam Hossein* [1905] 10 CWN 449, 490.

himself based his opinion on Ameer Ali's *Mahomedan Law* in the first edition of his book though he was not in full agreement with these views. Ameer Ali had asserted that Islamic law had changed with the passage of time in order to respond to social change. Wilson however was sceptical about any such change in Islamic law since the *Hidāya* was written. He thought that these views required careful attention before the courts despite the fact that Ameer Ali by then was appointed a judge of the Calcutta High Court.²⁶

Careful attention was paid to the views of Ameer Ali and authorities mentioned by him in *Kulsoom Bibee v Golam Hossein*.²⁷ The Oxford law graduate and the barrister of Inner Temple, Justice John Woodroffe meticulously analysed and rebutted the arguments put forth by Ameer Ali.²⁸ Firstly, it was contended that no custom exists in India to establish a waqf of company's shares as was required according to the opinion of Muḥammad al-Shaybānī. Secondly, the permissive opinion of Zufar could not prevail over the opinions of Abū Yūsuf and Muḥammad al-Shaybānī. Thirdly, the *Hidāya* was an unquestionable authority that should be followed in case of any difference of opinion amongst the earlier jurists. He argued that after the supposed closure of the doors of *ijtihād*, the later jurists were to apply the principles previously formulated. They could not independently and progressively

²⁶ RK Wilson, *A Digest of Anglo-Muhammadan Law* (1st edn W. Thacker & Co 1895) 267-69.

²⁷ [1905] 10 CWN 449.

²⁸ He was Sir John George Woodroffe son of James Tisdall Woodroffe, the Attorney General of Bengal. Earlier in the *Bikani Mian* case, his father had contested Ameer Ali's views on the family waqf. Ameer Ali was a judge of the Calcutta High Court at that time. Suparna Gooptu, 'Woodroffe, Sir John George (1865–1936)', *Oxford Dictionary of National Biography*, OUP, 2004, <http://www.oxforddnb.com/view/article/41052>, accessed 28 October 2011. For more details see K Taylor, *Sir John Woodroffe, Tantra and Bengal* (Curzon 2001).

interpret or formulate law ‘to meet the changing wants of men and of societies’.²⁹ Before rectifying the inaccuracies in Ameer Ali’s translation of certain texts, Woodroffe J argued that there had not been, and could not be according to the conception of *ijtihād*, since the date of the *Hidāya*, ‘a progress from the limited definitions of the disciples to an unlimited rule which makes everything the subject of *wakf* which is capable of possession’.³⁰

The reason for inaccuracies in Ameer Ali’s translations was also pointed out by showing that Muḥammad al-Shaybānī allows an exception to the general rule for the appropriation of movables if a custom to appropriate is proved. However, Ameer Ali’s translation rendered the authorities as saying that the waqf could be made of anything, which was the ‘subject of transaction’. In these authorities the practice or custom referred to was the practice or custom to establish a waqf of a particular movable item. Therefore, the passages in Ameer Ali’s treatise should have been translated as ‘everything which it is practice or custom to make *wakf* of’ instead of ‘the *wakf* of every thing which formed the subject of business transactions’.³¹ After rectifying this mistake of translation, it was held:

After a very careful consideration of the matter I am fully satisfied that the translation which is tendered on behalf of the Plaintiffs which harmonises all the authorities and brings them into agreement with the Hedaya, is the correct one, and that excluding Zafar [sic] the teaching of the great Mujtahidun [sic], which was followed by later jurists is that unless a moveable is accessory to land or allowed because of certain traditions concerning the prophet [sic] and

²⁹ [1905] 10 CWN 449, 488.

³⁰ Ibid 491.

³¹ Ibid 493.

the sacred writings or there is a custom to make wakf of it, it cannot be lawfully appropriated. And if the opinion of Abu Yusuf is to prevail over Imam Mahomed (a point which I do not decide), then no exception exists even in favour of custom, assuming that there were (as there is not) any proof of a custom to appropriate in this case.³²

This judgment epitomises the general view of British judges towards Islamic law. According to them, Islamic law was unable to respond to the changing circumstances of society. Woodroffe J, in the concluding part of his judgment, regretfully noted that he would have been glad if he could have affirmed the broad principle, which was ‘well adopted to the circumstances and needs of modern life’, but that he had to determine the case according to what he found the law was, and not according to what he might conceive it should be.³³

He also appreciated the capacity of Islamic law to accommodate to change by noting that the rules in contention, especially according to the view of Muḥammad al-Shaybānī, recognise custom as a factor in the change of law. However, he was aware of the adverse impact of the English legal system on Islamic law and candidly acknowledged that there was scarce opportunity for growth in Islamic law under the doctrine of judicial precedent in India.³⁴

While the learned judge in this case correctly understood the classical legal texts and rectified the mistakes in the translation of Ameer Ali, this understanding was limited to the specific parts of these texts directly related to the controversy. A notable

³² Ibid 494.

³³ Ibid 495.

³⁴ Ibid.

omission was the understanding of the working of the Islamic legal system and the role of judges in it. Under classical Islamic law, the judge is given wide powers to deal with such circumstances. A *qāḍī* is empowered to choose amongst a variety of opinions the one that best applies to the circumstances of a certain case.³⁵

In the next edition of his *Student's Handbook of Mahomedan Law*, published after this decision, Ameer Ali asserted the accuracy of his translations.³⁶ He further stated that the shrines at Makkah and Kerbalā, and many mosques and religious institutions all over India, were largely supported by the income of moneys invested in government securities.³⁷ In the later edition of his *Mahomedan Law*, he further elaborated his arguments by stating that despite the closure of the doors of *ijtihād*, there was no authority, which prohibits 'interpretation of the old rules and doctrines to bring them into accord with social progress and the requirements of the time'.³⁸ The judge is at liberty to construe the legal principles liberally and to apply them in a manner most consistent with justice and expediency. In the case of conflicting opinions amongst the jurists, the judge is also authorised to choose either of the two

³⁵ Al-Shaykh Nizām (n 8) 314-17.

³⁶ SA Ali, *Student's Handbook of Mahomedan Law* (7th edn Thacker, Spink & Co 1925) 155. Ameer Ali and John Woodroffe were not strangers to each other. They co-authored a book in 1898 the *Law of Evidence Applicable to British India*. It appears that this difference of opinion did not cause much damage to their personal relations as they published a second co-authored book three years after this judgment in 1908, *Civil Procedure in British India: a Commentary on Act V of 1908*. Suparna Gooptu, 'Woodroffe, Sir John George (1865–1936)', (n 28).

³⁷ This assertion was not supported by any evidence. Recent researchers, however, have found that some shrines in the holy cities of Iraq were supported by the Shī'ī kings of Oudh state through securities issued by the East India Company. M Litvak, 'Money, Religion, and Politics: The Oudh Bequest in Najaf and Karbala', 1850-1903' (2001) 33 *International Journal of Middle East Studies* 1; M Litvak, 'The Finances of the 'Ulamā Communities of Najaf and Karbalā, 1796-1904' (2000) 40 *Die Welt des Islams* 41; JRI Cole, 'Indian Money' and the Shi'i Shrine Cities of Iraq, 1786-1850' (1986) 22 *Middle Eastern Studies* 461; JRI Cole, *Roots of North Indian Shī'ism in Iran and Iraq: Religion and State in Awadh, 1722-1859* (University of California Press 1988).

³⁸ Ali, *Mahomedan Law* (n 17) 258.

opinions, which is consistent with reason and the requirements of the time. These arguments were supported by translations from classical legal texts such as *Radd al-Muhtār*, *al-Durr al-Mukhtār*, *Fatāwā Qādī Khān*, *Fatāwā Ḥamādiyya* and ‘*Umdat al-qārī*, a commentary on the *Ṣaḥīḥ al-Bukhārī*.³⁹

Another Muslim scholar, Dr Suhrawardy, produced a lengthy article on the waqf of movables by providing translations of classical texts and *fatāwā* along with Arabic texts from various Muslim countries. The motivation for undertaking this laborious task was stated to be the conflicting decisions of the Indian High Courts on the waqf of shares and securities. He asserted that after reading the translation of those higher authorities, no doubt should remain in the minds of readers that the waqf of movables including money, shares in companies, securities and stocks was valid. This article was published in the *Journal of the Asiatic Society of Bengal* in June 1911.⁴⁰ However, it seemed to have gone unnoticed by both the legal commentators and judges, as it was neither cited in the case law nor in the later editions of the treatises of Ameer Ali, Wilson, Abdur Rahim, Tyabji, Mulla, Saksena and others. But it shows that the Muslim scholars were anxious to expand the scope of waqf to new types of property.⁴¹

After the above judgment in the *Kulsoon Bibi* case, the question about the validity of the waqf of shares and securities was sent for *fatāwā* to the Grand *Mufī* of

³⁹ Ibid 257-264.

⁴⁰ Dr A. al-Ma'mūn Suhrawardy (n 3) 321-430.

⁴¹ In his article, Dr Suhrawardy promised to publish the translation of the treatise of famous Shaykh ul-Islām Abū Sa'ūd on the cash waqf in the next issue of the Journal. Ibid 324-25.

Egypt, the *Muftī* of Alexandria who was also the Ḥanafī jurist of the University of al-Azhar and to one celebrated *Mujtahid* of Karbalā.⁴² The question posed to the first two was similar and invoked the doctrine of custom/usage (*ta'āmul*) for the validity of the waqf of shares and securities. The question was:

What is your opinion concerning the following case? An Indian of the Hanafi sect makes waqf of Government securities, stocks and bonds known amongst the Europeans as *Rente*,⁴³ or of shares in trading companies, the practice of which has been recognized in our time in certain countries. Will such a waqf be valid and permissible in India if it is recognized in Turkey for instance, and is it valid to make waqf of pickaxes and shovels in our time?⁴⁴

The question to the *Mujtahid* of Karbalā was limited to the waqf of shares only and was more elaborate by stating how the shares of a joint stock were held by several persons and profits were divided among them according to the shares held by each shareholder.⁴⁵ These scholars answered in the affirmative by relying on the opinion of Muḥammad al-Shaybānī that the waqf of movables is valid if there is a practice of making the waqf of particular movables. The *Muftī* of Egypt further endorsed his conclusion by regarding the shares of a company as a joint property (*mushāʿ*). The *Mujtahid* of Kerbalā (Iraq) declared that as the waqf of such shares is a joint property (*mushāʿ*), it is valid, provided possession is delivered to the *mutawallī*.⁴⁶

⁴² These *fatāwā* are dated 12 February 1908 and 28 September 1907 respectively. Ibid 371-75.

⁴³ This is a French expression for government securities. See JH Munro, 'The Medieval Origins of the Financial Revolution: Usury, Rentes, and Negotiability' (2003) 25 *The International History Review* 505.

⁴⁴ Dr A. al-Ma'mūn Suhrawardy (n 3) 371-72.

⁴⁵ Ibid 374-75.

⁴⁶ Ibid 375.

These *fatāwā* show that the Sunnī and Shī‘a ‘*ulamā*’ treated shares of a company as a joint property of the shareholders of the company. For them, the company was just like a partnership and the shareholders were the partners. This reflected the traditional description of business partnerships in classical Islamic legal texts. The Ottoman Civil Code *Majalla* classified partnerships under the heading of joint ownership.⁴⁷ This analysis of shares was not anomalous as shares of companies under English law were initially seen as representing the proportionate fraction of the company’s assets.⁴⁸ The shares in a company that owned land were treated as realty. However, in the late nineteenth century the doctrine of a company as a separate legal entity emerged and was bolstered by the provision of incorporation by registration.⁴⁹ A company was treated as an artificial person, having rights and liabilities, separate and independent of the rights and liabilities of its shareholders. The ‘*ulamā*’ who issued *fatāwā* on the legality of shares under Islamic law, however, did not appreciate this shift in the nature of corporations under English law.⁵⁰

⁴⁷ See Book 10 (Joint Ownership) of the *Majalla* (The Ottoman Civil Code 1870). WE Grigsby (tr), *The Medjelle or Ottoman Civil Law* (Stevens and Sons Ltd 1895) 215-95.

⁴⁸ R Pennington, 'Can Shares in Companies be Defined?' (1989) 10 *Company Lawyer* 40.

⁴⁹ N Lindley, *A Treatise on the Law of Partnership, including its application to Joint-Stock and other Companies* (1 of 2 vols, William Maxwell & Son 1860); J Armour, 'Companies and Other Associations' in A Burrows (ed) *English Private Law* 2nd edn, (OUP 2007) 173-76.

⁵⁰ The legality of corporations and their shares has been commonly accepted all over the Muslim world. The rise of Islamic banking and finance and a movement of Islamisation of economies in Muslim countries spurred some scholars to analyse the nature of corporations, especially juristic personality and limited liability from the *Fiqh* perspective. There is hardly any scholar who regards corporations as un-Islamic but the majority of them suggest that certain changes should be made in order for corporations to be adopted under the Islamic economic system. Taqi Usmani, a leading religious authority in contemporary Islamic finance, argues that classical *Fiqh* recognises both limited liability and juristic personality of corporations as these two features could be found in waqf, *bayt ul māl* (state treasury), joint-stock, a deceased’s estate (*tarka*) and most importantly the authorised trading slave (*al-‘abd al-māzūn*) whose owner was not liable for the losses incurred by him. He proposes that limited liability should not be available to the active shareholders of private companies, though an exception should be made for the sleeping partners of firms and the passive shareholders of private companies. MT Usmani, *An Introduction to Islamic Finance* (Maktaba Ma‘ārif al-Qur‘ān 2007) 221-32 (This article was first published in 1992 in the *New Horizon*). Professor Nyazee challenges this view by

The shares of a company could be conceptualised as joint property under classical Islamic law, but what about securities and bonds of government and companies with a fixed interest rate? None of the scholars who issued the above *fatāwā* attempted to answer this question. But the issue of the involvement of interest (*ribā*) in securities and bonds could hardly be ignored because of the strict prohibition of interest (*ribā*) under Islamic law.

3.2 Prohibition of Interest

Despite his elaborate arguments in favour of a waqf of shares and securities, Ameer Ali did not address the most critical point in this controversy; that is the involvement of interest (*ribā*) in shares and securities. In the above discussion, one could also notice that the questions for the *fatāwā* of the Grand *Muftī* of Egypt, the *Muftī* of Alexandria and the *Mujtahid* of Karbalā were drafted in such a way that the issue of the involvement of interest (*ribā*) in shares and securities was tactfully avoided. Whereas the shares of limited liability companies were relatively easier to adjust under Islamic law because they were similar to a profit and loss sharing arrangement, still Islamic prohibition of *gharar* (uncertainty) could be invoked to question the legality of profits arising out of such shares. This was especially the case when profits arose because of fluctuation in prices, particularly when such shares were traded on stock markets. Debentures and government securities were clearly not without

arguing that although classical jurists were aware of the concept of juristic personality, they did not confer it upon waqf, *bayt ul-māl* or a deceased's estate because their focus was upon the religious dimension of *Fiqh* and the concept of fictitious personality was not required in cases of religious duties. He invokes the doctrine of *Siyāsa al-Sharī'a*, whereby the ruler would be authorised to assign artificial personality to a non-human entity, which would have dual ownership by holding property of its members in its own name. IAK Nyazee, *Islamic Law of Business Organizations: Corporations* (International Institute of Islamic Thought 1998) 86-108.

interest. While this objection was not raised before the judge in the *Kulsoom Bibee* case, in the *Mohammad Sadiq Ali Khan* case the waqf was attacked on the basis that its subject matter comprised government promissory notes, on which interest was paid. But the court rejected this objection and held that investment in government securities though seeming to be a loan to the state might be considered as an investment in state property and thus was not similar to the charging of interest.⁵¹

While the courts might have regarded fixed interest on securities as an investment in government properties, it appears that the founders of the waqf of such securities were fully aware of the nature of profits arising out of such securities. This is evident from the Deed of Endowment dated 3 November 1863 executed by Sheikh Muhammad Ali, former King of Oudh. The deed specifically provided that the capital of his waqf should be invested in government promissory notes, and the interest accruing from this investment should be spent for the purposes of the waqf. The trustee was prohibited from spending the waqf money in order to keep the original fund intact. The charitable purposes of the waqf were to remain postponed until the interest was collected.⁵²

This paradox could hardly remain unnoticed by observers of Islamic law and practice in India. In the third edition of his *Anglo-Muhammadan Law*, Wilson ridiculed Ameer Ali because the latter had pointed out that shrines at holy places in Iraq and India were supported by the income invested in government securities.

⁵¹ *Mohammad Sadiq Ali Khan v Fakhr Jahan Begam* AIR 1929 Oudh 97, 112. This judgment was endorsed by the Privy Council on appeal. See below for details.

⁵² *Baker Ali v Anjuman Ara* [1903], *LI*, vol 485, shelf mark 130 f, 702-706.

Wilson responded that it meant that the ‘authorised guardians of the faith’ were not abiding by the prohibition of interest.⁵³ This criticism, however, could only be justified on moral grounds. Legally, the prohibition of interest (*ribā*) was never recognised by the Anglo-Indian Courts.⁵⁴

A footnote in Baillie’s translation of the *Fatāwā al-‘Ālamgīriyya* addressed the issue of interest in a waqf of securities; however, it was not noticed by either the legal commentators or judges:

If money were laid out in purchase of government securities, or the like, and the interest or dividend applied to the purposes of the wukf [sic], it does not appear to me that the objection would apply, as in the buying and selling of these there is no exchange of things of the same kind; and it is by no means uncommon for Mussulmans in India to take interest in that way.⁵⁵

Kemp J had observed the practice of interest taking amongst Indian Muslims in a case decided as early as 1869 regarding the waqf of money arising out of a mortgaged property. He held:

But it was said in the course of the argument that the endowment being now represented by the balance of the surplus sale-proceeds or by money, which is consumed in using, and that the appropriation being a thing which does not admit of its use without the destruction of the subject, it is invalid under the Mahomedan Law. There might, perhaps, have been some force in this argument at a time when to receive interest was, if not unknown, strictly prohibited to Mahomedans. But in these days such a prohibition is openly disregarded by Mahomedans in their every day transactions.⁵⁶

⁵³ RK Wilson, *Anglo-Muhammadan Law* (3rd edn, W. Thacker & Co 1908) 342.

⁵⁴ Rahim, *The Principles of Muhammadan Jurisprudence* (Luzac & Co. 1911) 308.

⁵⁵ Baillie, *A Digest of Moohummudan Law* (2nd edn, Smith, Elder, & Co 1875) footnote 1, 571.

⁵⁶ *Khajah Hossein Ali v Shahzadee Hazara Begum* [1869] 12 WR 344, 346.

Of particular interest was the advice of the learned judge in order to achieve the permanence of endowment:

The sum remaining in deposit may be invested in Government securities, and the interest appropriated to the purposes of the endowment; the principal will remain intact, and so far from being “consumed in using,” will, by being used, produce an income for the purposes for which it was the intention of the endower that his charity should be bestowed...⁵⁷

It is worth noting that Kemp J had in his mind the principle of English trust law wherein the trustee could invest the trust money that was not immediately required for the purposes of the trust in government securities.⁵⁸ His observation on non-observance of the prohibition of interest by Indian Muslims was accepted by the dissenting judge Marby J, who questioned the validity of the private waqf and noted that the waqf of money could not be enforced by courts.⁵⁹ However, like Baillie’s comment, this judgment also remained unnoticed by legal commentators, lawyers and judges.

Wilson also seems to be unaware of the internal discourse amongst contemporary Muslim jurists (*‘ulamā’*) regarding interest (*ribā*). Initially, charging of interest on loans was regarded as prohibited by Muslim jurists. However, during the early nineteenth century when the scale of loan transactions increased due to

⁵⁷ Ibid.

⁵⁸ T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (A. Maxwell 1837) 305. This principle was embodied in section 20 of the Indian Trust Act 1882.

⁵⁹ Ibid 349-50. The issue of the non-enforcement of the waqf of money by courts did not appear in subsequent cases.

commercial and banking activities, religious scholars felt pressurised to accommodate interest (*ribā*). These were exactly the circumstances that led to the abolition of anti usury regulations under English law.⁶⁰ Under classical Islamic law, interest could be charged in lands that did not fall under Islamic rule (*dār al-Islām*). There was a difference of opinion amongst classical jurists as to whether Muslims could charge interest to non-believers and People of the Book (Jews and Christians). In the early 1830s, Sayyid Muḥammad, the chief Shī‘a *Mujtahid* in Lukhnow resolved this issue when asked whether interest could be charged upon Jews, Christians, Hindus and Ṣufī Muslims. He replied that interest could be charged upon polytheists with their consent and Ṣufī Muslims could be considered polytheists. As to Jews and Christians, he clarified that jurists differed but the clearest view according to him, was that they could be charged interest.⁶¹ On the other hand, the mainstream Sunnī jurists opposed interest in all its forms and manifestations. The prohibition of interest under Islamic law was a partial reason for the invalidation of the waqf of usufructuary mortgage in *Rahman v Baqridan*.⁶² In this case, the judge referred to the opinion of a scholar from Lukhnow, Muḥammad ‘Abd al-Ḥayy, to declare the waqf invalid because of interest.⁶³

The *ratio decidendi* in the *Kulsoom Bibee* case did not resolve the judicial

⁶⁰ H Broom and EA Hadley, *Commentaries on the Laws of England* (3 of 4 vols, William Maxwell & Son 1869) 205-10.

⁶¹ Musharraf Ali Khan, ed, *Bayāz-i masā’il*, 3:26 quoted in Cole, *Roots of North Indian Shī‘ism in Iran and Iraq* (n 37) 263.

⁶² AIR 1936 Oudh 213.

⁶³ This is the only case that I have come across that refers to the opinion of a contemporary Muslim scholar and also applies Islamic prohibition of interest. The *fatwā* is reproduced in Muḥammad ‘Abd al-Ḥayy, *Majmū‘at al-fatāwā* (2 vols, H. M. Sa‘īd Kumpanī 1984) 127.

controversy. The Bombay High Court in *Banubi v Narsingrao* held that movables are a valid subject of waqf and there is no reason why money being movable should not then be valid subject of a waqf. However, the judges in this case in expressing their considered opinion on this point did not take into account all authorities. In fact, no authority was mentioned in support of this view.⁶⁴ But this case carried more judicial authority as it was decided by two judges as against the *Kulsoom Bibee* case, which was decided by a single judge.

Nevertheless, the judgment in *Kulsoom Bibee* was followed in another Bombay High Court decision, *Bai Fatmabai v Gulam Husen*.⁶⁵ In this case, an elaborate but unreported judgment of the Lower Chief Court of Burma, which reached the same conclusion, is mentioned. Unlike other judgments, this case regarded shares in limited liability companies as debts due by the companies to their shareholders. As a debt is not a valid subject of waqf, therefore shares of limited liability companies could also not be the valid subject of a waqf. Further two objections were raised: first regarding the ownership of shares by God as He is the owner of waqf property; and second, regarding the perpetual nature of a company. On the first point, it was held that shares in a limited liability company are particular sums of money due by a company to its shareholders and they could not be subjected to divine property. Secondly, perpetuity which Muslims associate with the waqf could not be attributed to a limited liability company as its constitution can be altered under the Indian Companies Memorandum

⁶⁴ [1906] ILR 31 Bom 250.

⁶⁵ [1907] 9 BLR 1337.

of Association Act of 1895.⁶⁶

The main objection meant that the shares were not actual property rather they were interests or rights in the sense of a debt. This was in line with the classification of shares under English property law which regarded shares as ‘choses in action’, a term used to denote things of abstract character that are not possessed and cannot be physically enjoyed because they are entitlements available only by a legal action.⁶⁷ The second objection effectively meant that unlike a waqf, a limited liability company was not perpetual as it could be wound up. The learned judge, however, did not consider the possibility of the investment of the proceeds, if any, gained from a wound up company in other movable or immovable property. The first objection, by which shares were regarded as a precarious type of property similar to debt, showed that the learned judge misunderstood the legal nature of the shares of companies under English law.⁶⁸ This is somewhat surprising as the late nineteenth and early twentieth century was when English courts had decided landmark cases clarifying the legal nature of shares and securities.⁶⁹ This was also contrary to the dictum in the

⁶⁶ Ibid 1343-45.

⁶⁷ W Blackstone, *Commentaries on the Laws of England* (2 of 4 vols, The University of Chicago Press 1979) 396-97.

⁶⁸ English case law established that shares could not be considered analogous to debt and the company as the debtor. *Lee v Neuchatel Asphalte Co.* [1889] 41 Ch D 9, 23.

⁶⁹ In *Borland's Trustee* a share was described as ‘the interest of a shareholder in the company measured by a sum of money’. It further clarified that ‘a share is not a sum of money..., but is an interest measured by a sum of money and made up of various rights contained in the contract ...’ [1901] 1 Ch 279, 288. In *Bank of Hindustan, China, and Japan Limited v Alison*, Willes J observed that the interest of a shareholder in a joint stock company was regarded as ‘not an interest in the real or personal property of the company, including its business or goodwill’; it was, rather, ‘merely a right to have a share of the profits of the company when realised and divided amongst its members.’ [1870] LR 6 CP 54, 74. Previously, in 1838 in *Bradley v Holdsworth* the court clarified that shares are not interest in land even though the company may hold land. [1838] 3 M & W 422. However, during the eighteenth century, shares were treated as realty. *Drybutter v Bartholemew* [1723] 2 P Wms 127, 24 ER 668; *Sandys v Sibthorpe* [1778] Dick 545, 21 ER 382. But various Companies Acts described shares as

Fatima Bibi case wherein Wilson J held that the right of shareholders in limited liability companies is a right to share in the form of dividends in the profits of the business of the company.⁷⁰ The objection about God's ownership of shares and securities showed that the learned judge was confused about their nature as property. The judges in these cases appeared to have conceptualised shares of companies as a kind of obligation though without using this term. As an obligation is distinct from property, at least in one type of analysis of English property law, it followed that it could not be subjected to a waqf.⁷¹

The *ratio decidendi* of in the *Bai Fatmabai* case was followed in *Kadir Ibrahim v Mohammad Rahumadalla* without much analysis of authorities.⁷² But it was dissented from in *The Attorney General of Bombay v Yusufalli* on the ground that interest was paid as a matter of course in the Dawoodi Bohra community of traders. However, no further analysis was undertaken of the waqf of shares and securities.⁷³ Therefore, the issue of the ownership of shares by God and the perpetuity of such

personal estate and not real estate. S 22 Companies Act 1862, s 22 Companies (Consolidation) Act 1908, and s 73 Companies Act 1948.

⁷⁰ [1881] 9 CLR 66.

⁷¹ The concept of 'share' under English law kept on evolving until recently. The commentators and theorists of English law have struggled to conceptualise shares as either property or obligation; real or personal property; and wealth or non-wealth. A Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Hart Publishing 2005) 217. The American author C. Reinold Noyes in his book published in 1936 likened the 'lineal' interests in funds to the English feudal system which consisted of estates in land. C Noyes, *The Institution of Property* (Longman Green & Co 1936) 514-17.

⁷² [1909] 4 IC 136.

⁷³ [1922] 24 BLR 1060. This is an important case that involved an interesting legal question about the nature of waqf that comprised money paid by worshippers into a collection box (*galla*). Whether offerings (*nazrāna*) into the box constituted a waqf property or income from the tomb or mosque to which such a box was attached? In *Zooleka Bibi v Syed Zynul Abedin* [1904] 6 BLR 1058 the Court held that offerings (*nazrāna*) to the *Dargāh* (shrine) should be treated as income of the *Dargāh*. However, the judge in this case rejected this rule and held that such offerings though in the form of money constituted a waqf. Thus the waqf of a fund was recognised as valid.

waqf, the two points raised in *Bai Fatmabai*, could not be subjected to judicial analysis.

As mentioned above, the courts and legal commentators noted the existing prevalence of interest charging among Indian Muslims. The Islamic prohibition of interest was presumed to be inapplicable in India although there was no judicial, customary or statutory authority on this point. The only example of rationalising usury for Muslims is found in two articles produced by Baillie. He argued that since India had ceased to be under Islamic rule (*dār al-Islām*) it was perfectly legitimate for Muslims to invest their spare money in government securities. He rather encouraged Muslims to do so.⁷⁴ This was a purely legalistic argument as it ignored not only the practice of interest taking amongst Muslims, but also the fact that the contemporary Islamic state, the Ottoman Empire, allowed interest by fixing the rate of interest.⁷⁵ Baillie's argument was not presented before courts.

After the removal of the prohibition of usury by the Usury Repeal Act 1855, it was argued before courts that it also applied on the Islamic prohibition of interest. In one case, the Calcutta High Court held that the Act was never intended to repeal Hindu or Muhammadan law on interest but was rather meant to repeal the various

⁷⁴ NBE Baillie, 'On the Duty Which Mohammedans in British India Owe, on the Principles of Their Own Law, to the Government of the Country' (1881) 13 Journal of the Royal Asiatic Society of Great Britain and Ireland 429; NBE Baillie, 'Supplement to a Paper "On the Duty Which Mohammedans in British India Owe"' (1881) 13 Journal of the Royal Asiatic Society of Great Britain and Ireland 577.

⁷⁵ Neş'et Çağatay, 'Riba and Interest Concept and Banking in the Ottoman Empire' (1970) *Studia Islamica* 53; I Mouradgea d'Ohsson, *Tableau Général de l'Empire Othoman* (De l'imprimerie de monsieur 1788) 280.

Regulations and Acts which the English Government of India had passed on usury.⁷⁶ In a later case decided by the same court, however, the opposite view was taken. In addition, Phear and Markby JJ noted the custom of taking interest between Muslims had been recognised and enforced by the Anglo-Indian Courts ever since they were established.⁷⁷ The Privy Council, without resolving this conflict in authorities, decided for an equitable interest on dower debt of a wife.⁷⁸

3.3 Privy Council on Waqf of Shares and Securities

It was unfortunate that none of the above cases went to appeal in the Privy Council. Thus *Kulsoom Bibee* remained the most authoritatively analysed case on this point. While at least five cases in which shares and securities formed the subject of waqf reached the Privy Council between 1867 and 1937, in none of them the question about the validity of the subject of waqf was crucial. Consequently, the Privy Council did not issue any authoritative ruling on this point. But the Indian High Courts regarded the endorsement of the decision of the Oudh High Court in *Mohammad Sadiq Ali Khan*⁷⁹ by the Privy Council as an authority for the validity of the waqf of shares and securities.⁸⁰

The first such case reached the Privy Council in 1867. The subject of the waqf

⁷⁶ *Ram Lal Mookharjee v Haran Chandra Dhar* [1869] 3 Beng LR, OC 130, 134.

⁷⁷ *Mia Khan v Manu Khan* [1870] 5 Beng LR 500, 508.

⁷⁸ *Hamira Bibi v Zubaida Bibi* (Allahabad) [1916] UKPC 81.

⁷⁹ *Mohammad Sadiq Ali Khan v Fakhr Jahan Begam* 1929 AIR Oudh 97.

⁸⁰ *Nawab Mirza Mohammad Sadiq Ali Khan v Nawab Fakr Jahan Begam* (Lucknow) [1931] UKPC 90, 59 IA 1.

was *Radd-i-Mazalim* fund, which figured in the proceedings as a ‘family, religious and charitable fund’. The real controversy was about the appointment of a stranger as a co-trustee of the fund. This appointment was challenged on two grounds: first its incompatibility with the status and dignity of the appellant, and second its inconsistency with the family usage. The trial court had appointed a co-trustee and a scheme of management was also directed for the management of the fund. The Privy Council affirmed this decision as being in line with the intention of the founder of the trust. It was also pointed out that no sufficient reasons were advanced to interfere with the discretion of the Judicial Commissioner to appoint a co-trustee. The waqf was also challenged on the ground of being fraudulent, created to deprive legal heirs of their share in the inheritance. The Privy Council declared the waqf as a valid *inter vivos* gift. The waqf could have been challenged on the ground that its subject comprised movable property. However, neither party raised this point. Consequently, the Privy Council did not enquire into the issue.⁸¹

Sixty-four years later, however, this issue was raised before the Privy Council regarding the same waqf in the *Mohammad Sadiq Ali Khan* case.⁸² This time the waqf was challenged on the ground that it comprised promissory notes which being movable and involving interest could not be the valid subject of a waqf. However, the Privy Council found it ‘unnecessary to attempt a solution of the interesting problem of Mahomedan law which was propounded to the Chief Court’, because of two reasons. First, the waqf had been in existence for more than seventy-five years and the Privy

⁸¹ *Nawab Umjad Ally Khan v Mohumdee Begum* (Oudh) [1867] UKPC 41, 11 MIA 517.

⁸² *Nawab Mirza Mohammad Sadiq Ali Khan v Nawab Fakr Jahan Begam* (Lucknow) [1931] UKPC 90, 59 IA 1.

Council itself had endorsed the appointment of a co-trustee and drawing of management scheme for it. Second, there were conflicting decisions of the Indian High Courts on the validity of such waqf. Therefore, their Lordships found it appropriate to endorse the decision of the Chief Court, which by 'taking modern ideas into account' had found the objections against the validity of the waqf of government promissory notes to be unsustainable.⁸³ This was an implied endorsement of the decision of the Chief Court.⁸⁴

Earlier in 1924, in *Mirza Fida Rasul v Mirza Yaqub Beg* the question was raised before the Privy Council on whether a cash waqf was valid under Muhammadan law. But this question was not discussed before the Privy Council. Their Lordships did not disturb the decision of the Oudh High Court and thought it unnecessary to express their opinion upon this point.⁸⁵ The Oudh High Court held:

There is a conflict of opinion among different High Courts in India whether the waqf of cash is valid or not. We prefer to follow the opinion of the Allahabad High Court in 24 All. 190 [*Abu Sayid Khan v Bakar Ali*], that such a waqf is valid according to the Muhammadan law because the opinion has found favour with learned Muhammadan Commentators (Amir Ali, Vol. 1, 4th edition p.246, and Tyabji, 2nd edition, pp. 574, 578 and 579). In the present case the money has been spent in constructing buildings, so the prohibition against interest enjoined by Muhammadan law will have [no] operation here.⁸⁶

⁸³ Ibid 17.

⁸⁴ The High Court decision was reported as *Mohammad Sadiq Ali Khan v Fakhr Jahan Begam* 1929 AIR Oudh 97. The judges did not go into any detailed analysis of the judicial authorities on this point. Only *Kadir Ibrahim v Mohammad Rahumadalla* [1909] 4 IC 136 was mentioned, wherein it was held that the right to recover money could not be subjected to a waqf.

⁸⁵ (Oudh) [1924] UKPC 89, AIR 1925 PC 101.

⁸⁶ (*Mirza*) *Yaqub Beg v Mirza Rasul Beg* 1923 AIR Oudh 254, 265.

In reaching its conclusion, the court relied upon a similar case where the difficulty was removed by the fact that the government promissory note was negotiated with the permission of the court and the proceeds were invested in landed property.⁸⁷

In a subsequent case before the Privy Council, the plaintiff initially raised the objection on the validity of the waqf on the ground that it comprised movable property. However, given the change in judicial authorities, this objection was withdrawn.⁸⁸ In another case *Baker Ali v Anjuman Ara*, the subject of the disputed waqf was promissory notes and the *waqfnama* (waqf deed) had specifically provided that the interest arising out of these notes was to be used for the expenses of an *imāmbāra*. However, the validity of this waqf was not challenged on this point and the Privy Council did not express any opinion on it.⁸⁹ Likewise, waqf of money is mentioned in *Nawab Sultan Begum v Nawab Qamar Ara Begum* but the validity of this waqf was not disputed in this case.⁹⁰

3.4 Impact of the Mussalman Wakf Validating Act 1913

The judicial attitude to the waqf of shares and securities started to change with the promulgation of the Mussalman Wakf Validating Act 1913. Section 2 of the Act provided that a valid waqf could be created of ‘any property’ for any purpose recognised by the Mussalman law as religious, pious or charitable. As shares and securities were property, they could be the subject of a waqf. This view was adopted

⁸⁷ *Izat-un-nisa Begam v Kaniz Fatima Begam* 1916 AIR Oudh 6.

⁸⁸ *Syed Ali Zamin v Syed Akbar Ali Khan* (Patna) [1937] UKPC 32, 64 IA 158.

⁸⁹ (Oudh) [1903] UKPC 13, 30 IA 94.

⁹⁰ (Oudh) [1933] UKPC 28.

in *Abdulsakur Haji v Abubakkar Haji Abba*.⁹¹ In this case, Mirza J mentioned the leading conflicting authorities on this point and reached his conclusion without analysing them or supporting his decision by any other authority. His view, however, was followed in subsequent cases as the *ratio decidendi*. In one case it was held that the difficulties arising under strict Muhammadan law were removed by the Act 1913 and any property, which could be subjected to a permanent dedication, is a valid subject matter of waqf.⁹²

After the Privy Council's implied endorsement of the waqf of securities in the *Nawab Mohammad Sadiq Ali Khan* case and the promulgation of the 1913 Act along with its retrospective effect through the Mussalman Wakf Validating Act 1930, the dominant view appeared to be that the waqf of shares and securities was valid. A specimen of waqf deed produced in a treatise written in 1932 specifically mentioned movable property such as shares of joint stock companies, government securities, and money as the subject of waqf.⁹³ However, this was not the end of the legal controversy. The next question was whether the waqf of all types of movable property was valid. Secondly, whether the definition of property was to be determined under Islamic law or English law.

The Oudh High Court declared the waqf of a usufructuary mortgage over immovable property invalid because of two reasons: first, the founder was not the

⁹¹ [1930] 32 BLR 215.

⁹² *Amir Ahmad v Mohammad Ejaz Husain* AIR 1936 All 15, 16.

⁹³ A Ghosh, *The Law of Endowments (Hindu & Mahomedan)* (Eastern Law House 1932) 855-56.

owner of the mortgaged property and did not have permanent control over it; and secondly, an usufructuary mortgage itself is not valid according to Muhammadan law because it falls under the prohibition of interest.⁹⁴ Likewise, a waqf could not be made of a mere right to usufruct, such as rent charge, and revenue of villages could not be made subject of a waqf.⁹⁵ In *Kadir Ibrahim v Mahammad Rahumadalla*, it was held that a court decree of property could not be made a valid subject of a waqf.⁹⁶ In 1944, this case was held to be obsolete after the passing of the Wakf Validating Act 1913 despite the fact that the object of the Act was to legalise family awqāf.⁹⁷ Before this decision, the ratio in *Kadir Ibrahim* was followed in *Nosh Ali v Shamsunnesa Bibi* regarding the waqf of dower debt. In this case, it was observed that though the investment in securities and shares yields income, money exhausts in the maintenance of the waqf and thus fails to fulfil the requirement of permanence.⁹⁸ In a subsequent case, it was noted that a court decree is property but it is ‘too precarious a nature to admit of a permanent dedication’.⁹⁹ An additional factor in this case was that the assignment of the court decree was not made a waqf directly, rather it formed part of the assets of a going concern. Therefore, the waqf of the decree as an asset of the firm was validated presumably on the ground that it fulfilled the requirement of permanence. It follows that a corporation that has a permanent existence can validly be dedicated as a waqf. However, it would give rise to interesting theoretical issues,

⁹⁴ *Rahman v Baqridan* AIR 1936 Oudh 213.

⁹⁵ *Puram Atal v Darsham Das* [1911] 9 ALJ 709.

⁹⁶ [1910] 33 Mad 118.

⁹⁷ *Abdul Sattar Ismail v Abdul Hamid Sait* AIR 1944 Mad 504, 509-10.

⁹⁸ AIR 1939 All 319.

⁹⁹ *Ghulam Mohiuddin v Hafiz Abdul* AIR 1947 All 127, 136.

as a corporation cannot be subjected to ownership since it is a person in its own right. Even the sole member of a single member company is not its legal owner. But if all shares of a corporation are dedicated and a waqf of shares rather than the corporation is established it would be valid.¹⁰⁰ This proposition was not judicially tested during the period covered under this study in the courts of India.

An anomaly in the above judgments is that both shares and securities are treated as the same in almost all cases except *Nawab Mohammad Sadiq Ali Khan*. In this case the judges found the objection that the income from government promissory notes is an interest on debt and thus unacceptable by orthodox Shī'a law 'too subtle for acceptance'. Stuart CJ and Mohammad Raza J held that investment of money in government promissory notes and shares of companies could not be distinguished. In the early days of Islam both forms of investment did not exist. They found it reasonable to consider investment in government securities as an investment in state property and the income arising therefrom as the portion of the income of state enjoyed by the investors.¹⁰¹

The blurring of this distinction between shares and securities served both proponents and opponents of the waqf of shares and securities. For the proponents, both shares and securities were property that could be utilized permanently. They ignored the fact that unlike dividends on shares, which could amount to profit from an

¹⁰⁰ Professor Kamali endorses the waqf of stocks and shares and also proposes the establishment of a waqf corporation that might operate as a business enterprise. However, he does not inquire into the theoretical questions regarding the ownership of such corporation. MH Kamali, *Equity and Fairness in Islam* (The Islamic Texts Society 2005) 98.

¹⁰¹ AIR 1929 Oudh 97.

enterprise, returns on securities were fixed interest, pure and simple. For the opponents, on the other hand, shares and securities were a property of an ephemeral nature that could hardly last into perpetuity.

As is shown above, the legal controversy regarding a waqf of shares and securities was resolved to a certain extent after the promulgation of the 1913 Act, which allowed the establishment of waqf of 'any property'. Shares and securities being property were the proper subject of a valid waqf. The courts did not go into further details as to the definition of property.

The Bill of the Mussalman Wakf Validating Act was criticised by one Muslim member of the Imperial Legislative Council, Mr Ghuznavi, for including 'stocks, shares, and securities' in the definition of 'movable property' which according to him necessarily included interest that is unlawful under Islamic law.¹⁰² The full definition of movable property in the draft Bill also included actionable claims and property of every description except immovable property. The promoter of this Bill was Muhammad Ali Jinnah. He was aware of this controversy about the subject matter of waqf. As a legal counsel in *Fatmabai v Gulam Husen*, he opposed the waqf of shares on the ground of perpetuity and prohibition of interest.¹⁰³ But as the promoter of the Bill, he wanted to extend the subject matter of waqf to all types of movable property.

¹⁰² *PILC*, 1912-1914, IOR/V/9/38-40, 221.

¹⁰³ [1907] 9 BLR 1337, 1338.

The sub-committee that discussed the draft Bill comprised fifteen members; seven Muslims, seven British and one Hindu.¹⁰⁴ The final draft incorporated the criticism of Mr Ghuznavi by removing the words ‘stocks, shares, and securities’ and used the word ‘property’ instead. It was left to the courts to determine the meaning of ‘property’. In the fifth edition of Wilson’s *Anglo-Muhammadan Law*, the author after referring to this legislative history of the 1913 Act, suggested that the words ‘any property’ in the Act were to be understood according to the provisions of Islamic law.¹⁰⁵ However, as we have seen above, the courts did not accept this argument.

The courts simply stated that shares and securities were property without analyzing the concept of property under Islamic law or even under English law. The equivalent of property under Islamic law is *māl*, which is generally understood as any thing that can be acquired, possessed and owned. The Ḥanafī jurists defined *māl* narrowly as a thing to which human nature inclines and is capable of being secured for use at a time of necessity.¹⁰⁶ This general definition includes only corporeal and tangible objects. Thus shares and securities, if classified as incorporeal and intangible property or rights, are not property according to the Ḥanafī jurists. They do not regard usufruct (*manfaʿ*) as property because it could not exist independent of the corporeal

¹⁰⁴ *PILC*, 1912-1914, IOR/V/9/38-40, 219.

¹⁰⁵ Wilson, *Anglo-Muhammadan Law* (5th edn, W. Thacker & Co 1921) 341.

¹⁰⁶ Art 126 of the *Majalla* (the Ottoman Civil Code 1870) defined *māl* (property) as: ‘Property consists of something desired by human nature and which can be put aside against time of necessity. It comprises movable and immovable property.’

property.¹⁰⁷ But if property can be the storage of value as currency then shares and securities fall within the definition of property as they are valuable and can be stored. There is no doubt that shares and securities could be owned as the concept of ownership (*milk*) under Ḥanafī law is widely defined and covers a wide range of subjects including proprietary rights, usufructs and services.¹⁰⁸ Thus shares and securities could be subjected to ownership as property without giving rise to much legal controversy though it was hard to classify them within the categorisation of property (*māl*) eg movable or immovable (*manqūl wa ghayr manqūl* also called ‘*iqār*’); fungible or non fungible (*mithlī wa qīmī*); and most controversially, property rights or obligation (‘*ayn wa dayn*’).¹⁰⁹

Any theoretical discussion regarding the nature of property under English law and Islamic law was missing not only from the judgments, but also from the legal treatises. The only extant treatise on Islamic jurisprudence which treated the science of Islamic law, *uṣūl al-Fiqh*, was Sir Abdur Rahim’s *The Principles of Muhammadan Jurisprudence* published in 1911. Given its general nature, this treatise did not analyse in detail the theoretical issues surrounding the waqf of shares and securities. It shows

¹⁰⁷ MW Islam, 'Al-Mal: The Concept of Property in Islamic Legal Thought' (1999) 14 Arab Law Quarterly 361, 366; M Zahraa and SM Mahmor, 'Definition and Scope of the Islamic Concept of Sale of Goods' (2001) 16 Arab Law Quarterly 215, 218.

¹⁰⁸ *Milk* is the legal relationship between a man and a thing that is under his absolute power, disposition and control to the exclusion of others. Rahim, *The Principles of Muhammadan Jurisprudence* (n 54) 262.

¹⁰⁹ Ibid 269. The Islamic law equivalent of property and obligation, ‘*ayn wa dayn*’ are not exactly the same. The leading Arab jurist of the twentieth century Sanhuri argues that ‘*ayn*’ is specific to identifiable property while *dayn* is not. Vogel identifies the complex usage of *dayn* in *Fiqh*. He regards *dayn* as any property not an ‘*ayn*’ as in *Fiqh* the *dayn* does not refer to the “obligation” per se, but rather to the property’ that is subject to the obligation. However, he clarifies that the reference to *dayn* as property is fictive since such property has not been identified. FE Vogel and SL Hayes, *Islamic Law and Finance* (Brill 2006) 94-95. For further information see NHD Foster, 'Owing and Owning in Islamic and Western Law' (2003-2004) 10 Yearbook of Islamic and Middle Eastern Law 59, 71-2.

that though the segments of Islamic law were actively applied by the British Indian Courts, this application was severed from the historical and theoretical constructs of the Islamic legal system.

Meanwhile the statutes which were passed for the regulation of awqāf provided that waqf could be made of both movable and immovable property. Subsection 5 of section 3 of the United Provinces Muslim Wakfs Act 1936 laid down that ‘property includes Government securities and bonds, shares in firms and companies, stocks, debentures and other securities and instruments’. The Bengal Wakf Act 1934 and the Delhi Muslim Wakfs Act 1943 provided that a waqf could be made of both movable and immovable property. Section 55 of the Bengal Wakf Act 1934 required a *mutawallī* to invest the waqf property in case it consists of money.¹¹⁰

3.5 Adoption of Change under Islamic Law

The extension in the subject matter of waqf was a significant development in waqf law.¹¹¹ At this stage, the question arises as to whether Islamic law, as interpreted by the Ḥanafī jurists could have accommodated similar such change within its own terms. In other words, whether the waqf of new types of movable property could be validated under Islamic law. If so, then what was the legal authority, if any, to support this?

¹¹⁰ These statutes are discussed in detail in Chapter 3.

¹¹¹ It must be clarified here that the whole discourse in the Anglo-Indian Courts was primarily limited to the Ḥanafī school and more specifically to the translation of the *Hidāya* and to some extent the translation of the *Fatāwā al-‘Alamgīriyya*. Other schools adopted a wider approach to this issue. The Hanbalī’s and Shāfī’s view is that every thing that can be used without extinguishing its substance can be the subject matter of a waqf. Ibn Qudāma, *Al-Mughnī* (‘Abd Allāh ibn ‘Abd al-Muḥsin Turkī and ‘Abd al-Fattāḥ Muḥammad Ḥulw eds, 8 of 15 vols, Dār ‘Ālam al-Kutub 1999) 229-30; Ibn al-Humām (n 2) 203.

As is shown above, the leading Muslim legal scholars, commentators, judges and lawyers vehemently argued for a broader and permissive approach on this issue. Ameer Ali tried to point out the liberal approach of some of the Ḥanafī jurists and asserted that it was a mistake to attach ‘canonical importance to the statements and arguments in the Hedaya’ because many of the doctrines set forth in it were either abandoned or modified.¹¹² Sir Abdur Rahim, on the other hand, accepted that the waqf of shares and securities was invalid under a strict conception of waqf in Islamic law, but he doubted whether the same was the case under the ‘principles of construction and application of Muḥammadan law as enunciated by the Privy Council’.¹¹³ He argued that there should not be any legal problem in dealing with government promissory notes, shares of limited liability companies and other securities; not only because the Muslim community commonly dealt with them but also because *Bay‘-ul-wafā* (conditional sale) was allowed despite being a stratagem to avoid prohibition of charging interest. He showed that the validity of a simple gift of government promissory notes and shares of companies was well established.¹¹⁴ Therefore, by this analogy, he argued, the same permissive approach should be adopted in the case of a waqf. He pointed out that the prohibition of interest (*ribā*) had never been recognised by the Anglo-Indian Courts and asserted that the restrictions on the subject matter of waqf were based on juristic deduction rather than a positive text. Therefore, they should not be followed literally especially when they were obviously unsuitable to

¹¹² Ali, *Mahommedan Law* (n 17) 264.

¹¹³ Rahim, *The Principles of Muhammadan Jurisprudence* (n 54) 307-08.

¹¹⁴ *Prince Suleman Kadr v Darab Ali Khan* (Oudh) [1881] UKPC 21, 8 IA 117.

modern life.¹¹⁵ Another prominent commentator, Faiz Tyabji, after reviewing textual and case law authorities on this point, argued that the waqf of money or any other property was valid even without the authority of the Wakf Validating Act 1913.¹¹⁶ However, this appeared to be merely his point of view, which was not supported by any authority from the classical texts. It seemed to be his endorsement of the opinion of Ameer Ali.¹¹⁷

While judges took into consideration these views of Muslim commentators in deciding cases, they were extremely careful in relying upon such views. In *Ghulam Mohiuddin v Hafiz Abdul*, a Muslim judge, Wali Ullah, noted the opinion of Abdur Rahim that necessity and the wants of social life were two important guiding principles recognised by Islamic law and held that '[t]he Courts administering Mohammadan Law are entitled to take into account the circumstances of actual life and the change in the people's habits and modes of living.'¹¹⁸ He also observed the opinion of Ameer Ali in support of the waqf of a debt. But he held that there was no reference to any particular authority in support of this modern view.¹¹⁹ The general guiding principles of Islamic law appeared to provide him with no authority and were not enough to validate the waqf of a money decree, though it fell under the definition of property as provided by the Wakf Validating Act 1913. It is not clear what the

¹¹⁵ Rahim, *The Principles of Muhammadan Jurisprudence* (n 54) 296, 307-08.

¹¹⁶ Tyabji, *Muhammadan Law* (3rd edn, N. M. Tripathi 1940) 577-78.

¹¹⁷ The validity of cash as a valid subject matter of a waqf even prior to this Act was subsequently endorsed by the Lahore High Court in *Abdul Razak v Ali Bakhsh* AIR 1946 Lah 200, 211.

¹¹⁸ AIR 1947 All 127, 135.

¹¹⁹ *Ibid* 136.

learned judge meant by authority, as he ignored arguments based on Islamic law and statutory law.¹²⁰ His rejection of Islamic law arguments can be justified since they were general in nature and he was free to exercise his discretion. But it is difficult to justify his rejection of the arguments from statutory law, which had been consistently endorsed by various Indian High Courts.

The Privy Council on its part exhibited extreme caution in adopting a progressive approach towards Islamic law especially because it was a religious law based on religious texts. Judicial attitude towards development in Islamic law can be understood from the following passage of a Privy Council judgment in *Baker Ali v Anjuman Ara*:

In *Abul Fata v. Russomoy Dhur Chowdhry* 22 I.A. pp86, 87, in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of the Mahommedan law and even precepts of the Prophet himself, of taking them literally, and *deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice*. That danger is equally great whether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.¹²¹

¹²⁰ His view resembled the Orthodox view adopted by the sixteenth century Ottoman judge, Chivizade, who rejected the cash waqf because in his words 'there is no guide or clarification for its permissibility'. MS Risale fi vakfi'n-nukud/Muhyiddin Muhammed B. Ilyas El-Mentesevi Civizade, location, ASIR EFENDI 459, Suleymāniyya Library, Istanbul. For its translation see JE Mandaville, 'Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire' (1979) 10 International Journal of Middle East Studies 289, 301.

¹²¹ *Baker Ali v Anjuman Ara* (Oudh) [1903] UKPC 13, 30 IA 94, 111 (emphasis added).

This judgment was in continuance of earlier ruling of the Privy Council wherein their Lordships refused to reconcile a quotation from the *Qur'ān* with the rule laid down in the *Hidāya* and Baillie's translation of the *Imāmiyya* as 'it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.'¹²²

The Indian High Courts followed this principle of non-recourse to original sources of Islamic law in order to draw their own inferences.¹²³ The private judgments and analogical deductions of ancient jurists were considered the most appropriate and legitimate mode of ascertaining Islamic law.¹²⁴ But courts were authorised to exercise wider powers of interpretation and judicial discretion under the doctrine of justice, equity and good conscience where the recognised authorities either refrained from giving their opinion on any controversial point or there was a conflict of opinion amongst the jurists.¹²⁵ It was held on the authority of Ameer Ali that the British Indian Courts exercise the functions of a *qāḍī* and may not be in a position to interfere with the primary rules of waqf law. However, they are entitled to interpret and apply the subsidiary rules in a manner that is most consistent with justice and expediency.¹²⁶

¹²² *Agha Mahomed v Koolsom Bee Bee* [1897] 24 IA 196, 204.

¹²³ *Saiyid Murtaza v Alhan Bibi* 2 IC 671 (All), *Imdad Ali v Ahmad Ali* 28 OC 55 1926 Oudh 518, 85 IC 400, 1 OWN 868.

¹²⁴ *Narantakath v Parakkal Mammu* 45 Mad 986, 43 MLJ 663, 1922 MWN 662, 1923 Mad 171, 71 IC 65.

¹²⁵ *Aziz Banu v Mohammad Ibrahim Husain* AIR 1925 All 720, 47 All 823, 23 ALJ 768, 89 IC 690; *Anis Begam v Malik Muhammad Istafa Wali Khan* AIR 1933 All 634, 1933 ALJ 1079, 55 All 743.

¹²⁶ *Abdul Razak v Ali Bakhsh* AIR 1946 Lah 200, 216.

Some scholars have criticised the Anglo-Indian Courts for making Islamic law rigid by applying the translations of selective texts and ignoring the underlying principles embodied in the *uṣūl al-Fiqh* (Islamic jurisprudence).¹²⁷ Revisionist historians have shown that Islamic law responded to social change through the institution of *iftā* (juristic opinions) and wider discretionary powers vested in the *qāḍī*.¹²⁸ Subsequent adoption of custom as a secondary source of Islamic law also introduced flexibility.¹²⁹ The Anglo-Indian Courts initially refused to accept any custom, which was in conflict with the express provisions of Muhammadan law, especially in cases of inheritance.¹³⁰ This view changed later. In 1922, the Privy Council held that in India ‘custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mohammedan Law, governing the succession in a particular community of Mohammedans.’¹³¹ In subsequent periods, efforts were made to compile customs for

¹²⁷ MR Anderson, 'Legal Scholarship and the Politics of Islam in British India' in RS Khare (ed) *Perspectives on Islamic Law, Justice, and Society* (Rowman & Littlefield 1999) 65-91; SA Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35 *Modern Asian Studies* 257; E Giunchi, 'The Reinvention of Sharī'a under the British Raj: In Search of Authenticity and Certainty' (2010) 69 *The Journal of Asian Studies* 1119.

¹²⁸ WB Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 *International Journal of Middle East Studies* 3; WB Hallaq, 'From Fatwās to Furū': Growth and Change in Islamic Substantive Law' (1994) 1 *Islamic Law and Society* 29; B Johansen, 'Legal Literature and the Problem of Change: The Case of the Land Rent' in C Mallat (ed) *Islam and Public Law: Classical and Contemporary Studies* (Graham & Trotman Ltd 1993) 29-47.

¹²⁹ Coulson finds out that customary practices made inroads into Islamic law since its inception, and practice almost always prevailed upon the written law under such principles as '*urf*' (custom/usage), *maṣlaḥa* (public interest) and *ḍarura* (necessity). NJ Coulson, 'Muslim Custom and Case-Law' (1959) 6 *Die Welt des Islams* 13.

¹³⁰ *Jowala Baksh v Dharm Singh* (Agra) [1866] UKPC 14, 10 MIA 511; *Azima Bibi v Munshi Shamlanand* (Bengal) [1912] UKPC 92, CWN 121.

¹³¹ *Mahomed Ibrahim Rowther v Shaikh Ibrahim Rowther* (Madras) [1922] UKPC 2, AIR 1922 PC 59.

administrative and judicial use.¹³² The Punjab Law Act 1872 gave custom priority over Muhammadan law. This was because agricultural custom was the result of ‘the special exigencies of agriculture as a calling and of the spirit of self preservation’.¹³³ The courts, however, doubted the extent to which custom could be given priority over the law.¹³⁴ The burden of proof as to the existence of custom contrary to the precepts of personal law was placed on the person alleging such custom because the law prescribed rather than presumed that custom was to govern the affairs of the parties to the exclusion of ordinary law.¹³⁵

It is true that the legal discourse in Anglo-Indian Courts was limited to the Ḥanafī school and no recourse was allowed to the original sources of Islamic law. However, this was hardly something new that the British introduced in India. The Ottoman ‘*ulamā*’ debated the issue of cash waqf within the boundaries laid down by the founding fathers of the Ḥanafī school in the sixteenth century. Even the Ottoman Caliph’s decree on the validity of cash waqf did not lay the issue at rest. Subsequent writers adhered to the opinions of Ḥanafī masters, though some of them mentioned

¹³² Data from villages was collected at district level and was systematically compiled especially for the collection of land revenue. C Boulnois, and WH Rattigan, *Notes on Customary Law as Administered in the Courts of the Punjab* (William Clowes and Sons 1878); CL Tupper, *Punjab Customary Law* (3 vols, Superintendent of Govt Printing 1881); HA Rose and MM Shafī, *A Compendium of the Punjab Customary Law* (Civil and Military Gazette Press 1911).

¹³³ *Muhammad Hayat Khan v Sandhe Khan* 55 PR [1908] 276-77.

¹³⁴ *Daya Ram v Sohel Singh* 110 PR [1906] FB 410-11. For a detailed account of judicial and legislative history of customs vis-à-vis Muhammadan Law see G Rankin, 'Custom and the Muslim Law in British India' (1939) 25 Transactions of the Grotius Society 89.

¹³⁵ *Abdul Hakim v Bilochni* 47 PR [1900] 173.

the opinion of Abū Sa‘ūd and the imperial decree.¹³⁶ It was only after the legislative enactment in the Middle East that the waqf of movable property including shares of companies was regarded as valid.¹³⁷ Therefore, Anglo-Indian Courts can hardly bear the sole responsibility for the lack of responsiveness and flexibility in Muhammadan law as administered by them.

4. Conclusion: Legal Equilibrium

This fascinating story about the development in the subject matter of waqf stretched over almost three quarters of a century. With the benefit of hindsight we can observe a tussle between three main groups: Judges of the Anglo-Indian Courts (including Muslims but a majority non-Muslim) who were adamant in applying the authoritative classical texts of Islamic law despite change of circumstances; Muslim legal commentators who were bent upon proving the adaptability of Islamic law with changing times; and Muslim religious scholars (*‘ulamā’*) who, despite remaining outside the courts and contributing the least in the juridical discourse directly, fiercely safeguarded the sacred principles of Islamic law.¹³⁸

At various stages in this story, there appeared to be alternating dominance by one group over the others. However, the resilient nature of each group made such

¹³⁶ Ibn ‘Ābidīn, *Radd al-muhtār ‘alā al-Durr al-mukhtār sharh Tanwīr al-abṣār* (‘Ādil Aḥmad ‘Abd al-Mawjūd and ‘Alī Muḥammad Mu‘awwaḍ eds, 6 of 14 vols, Dār al-Kutub al-‘Ilmiyya 2003) 555-57.

¹³⁷ Muḥammad Qadrī Bāshā, *Qānūn al-‘adl wa-al-inṣāf lil-qaḍā’ ‘alā mushkilāt al-awqāf* (first published in 1893, Dār al-Salām 2006) 200-01.

¹³⁸ The power of *‘ulamā’* was also reflected in the promulgation of the Muslim Personal Law (Shariat) Application Act 1937, which abrogated non-Islamic customs. The *‘ulamā’* also initiated legal change when they saw the strict application of the doctrines of the Hanafī school resulting in unwarranted consequences for women. The Dissolution of the Muslim Marriage Act 1939 amended the Hanafī law in order to give wives the right of judicial separation. F Khan, *Traditionalist Approaches to Sharī‘ah Reform: Mawlana Ashraf ‘Alī Thānawī’s Fatawa on Women’s Right to Divorce* (PhD Thesis, Michigan University 2008) 202-04.

victory short lived. When the conclusion was finally reached, each group could claim a partial victory. Muslim legal commentators could claim that the extension in the subject matter of waqf was the vindication of their earlier claims that waqf of any valuable property including all types of immovable property was valid. Judges could argue that this extension was due to the Mussalman Wakf Validating Act 1913, which allowed the waqf of ‘any property’. ‘*Ulamā*’ could assert that ‘any property’ excluded the types of interests that Islamic law did not consider as ‘property’ or that expressly involved interest (*ribā*).

This episode in the legal history of British India shows that despite there being a diminished role for ‘*ulamā*’—the traditional guardians of Islamic law—in the overall legal system, the English judicial system opened up a new venue for legal developments in Islamic law in an unprecedented fashion. It provided an arena where different groups could enter into a discourse and negotiate despite having unequal bargaining powers. In case of their failure to resolve their differences within this arena, legal battles could be taken to the public through the press, and to the legislature through politicians as happened in case of the Wakf Validating Act 1913. This study shows that various segments of Indian society participated in the operation of the new legal system. Legal change was adopted whenever a pressing need arose. The overall system did not stagnate, rather it responded to social change. The law was taken out of the hands of a small class of jurists and placed into the institutions that could represent the various strata of society by interacting with them.

Conclusion: Awqāf in the Making of Anglo-Muhammadan Law

The Indian economic historian, Tirthankar Roy portrays the British Empire as a 'legislating state' which was not merely an extractive enterprise, rather it incorporated various communities into an overarching political and legal system. The state tried to provide all communities one law as one nation or one state.¹ Roy appreciates the three distinct phases in colonial rule in India earlier identified by David Washbrook with respect to the role of law and the nature of property rights. These are: 'the mercantilist state', 'the high colonial state' and 'the incipient nation'.² Unlike Washbrook, Roy argues that the British Empire did not start as an 'extractive state', rather it started as a 'collaborating state' by winning local loyalties and gradually moved to setting standards of governance preparing for the rule of law. He describes this process as 'standardisation'.³ This view is not shared by a large number of scholars especially those who wrote in the post-colonial period. They have highlighted the negative impact of colonialism on local legal practices.⁴ It is pointed out that despite all the

¹ T Roy, 'Empire, Law and Economic Growth' (2012) 47 *Economic and Political Weekly* 98, 104.

² DA Washbrook, 'Law, State and Agrarian Society in Colonial India' (1981) 15 *Modern Asian Studies* 649, 711-15.

³ Roy (n 1) 103-04. In 1956 a meeting of the International Association of Legal Sciences, comprising English and French experts on Hindu and Muhammadan law, two judges of the Indian Supreme Court and a French sociologist, concluded that the Rule of Law was the greatest single benefit India received from the introduction of English legal ideas. Other benefits included a hierarchical court structure that was staffed by an independent and impartial judiciary, a system of appeals, and a body of trained lawyers. K Lipstein, 'The Reception of Western Law in India' (1957) 9 *International Social Science Bulletin* 85.

⁴ The historians associated with the 'Subaltern Studies Group' formed in the 1980s are particularly critical about the 'assumptions' and 'essentialism' of the 'Orientalism' of their predecessors while writing the colonial history of India. R Guha and others (eds), *Subaltern Studies: Writings on South Asian History and Society*, 10 vols (OUP 1982-99). Their important monographs include: P Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton University Press 1993), R Guha, *Dominance Without Hegemony: History and Power in Colonial India* (Harvard University Press 1997), and G Prakash, *The World of the Rural Labourer in Colonial India* (OUP 1992).

colonial propaganda manifested in the heading of reports submitted to the House of Commons, '*Material and Moral Progress of India*', the overall impact of colonial rule was that 'out of a once highly mobile, commercialized and contentious society', the British had created an agrarian social and economic structure governed by a feudal hierarchy.⁵ The impact of colonial rule on India during this period is described as 'an aborted modernization'.⁶ The debate between the 'rule of law' and 'aborted modernization' perspectives continues to unfold to this day.⁷ The focus of the present study however is not to assess the role of colonialism in British India, rather its primary aim is to explore the process of transformation in the nature of classical Islamic law (*Fiqh*) under the English legal system as a specific and revealing case study.

The findings of this study should therefore be understood, subject to the limitations of its primary material. It includes the cases on waqf law decided by the Judicial Committee of the Privy Council, along with the related cases decided by various Indian High Courts, legal commentaries, scholarly articles, legislative debates, official archives and relevant *fatāwā*. Legal developments were also taking place outside the judicial and legislative institutions. '*Ulamā*'—the traditional

⁵ D Washbrook, 'Economic Depression and the Making of 'Traditional' Society in Colonial India 1820-1855' (1993) 3 Transactions of the Royal Historical Society 237, 261.

⁶ E Stokes, 'The First Century of British Colonial Rule in India: Social Revolution or Social Stagnation?' (1973) Past & Present 136, 153. For an opposite view see EF Irschick, 'Order and Disorder in Colonial South India' (1989) 23 Modern Asian Studies 459.

⁷ While reviewing literature on colonial legal history, Osama acknowledges the difficulty of ignoring 'the colonial legal project's contribution towards bringing a certain level of desirable structure, consistency, uniformity and predictability to the Indian legal system' however, he argues that 'it is equally self-deceiving to ignore where it clearly deviated from or undermined these very principles'. O Siddique, 'The Hegemony of Heritage: The 'Narratives of Colonial Displacement' and the Absence of the Past in Pakistani Reform Narratives of the Present' (2010) Development Policy Research Centre, Lahore University of Management Sciences, Pakistan Working Paper 1, 51.

custodians of Islamic law—responded to new legal challenges through traditional forms, by issuing *fatāwā* and writing treatises. This study only partially engages with *fatāwā*, which were directly related to the issues raised in case law.

This study has explored developments in Islamic law under the English legal system by looking into the treatment of the classical Islamic law of waqf by the Privy Council and British Indian courts. It shows that classical Islamic law under the English judicial system was significantly transformed. The outcome of the interaction between substantive Islamic law and procedural English law was a hybrid legal system—Anglo-Muhammadan law. It was later renamed as Muslim Personal Law. This transformation was based on processes of legislation, translation, adjudication, legal commentaries and teaching. The colonial state deliberately relied upon adjudication rather than legislation as the primary mode of law making. This was due to the flexibility of adjudication as against legislative codification, which might have provoked the religious sensitivities of Indian Muslims.

This study shows that the whole process of transformation of classical Islamic law in British India was based on interaction, cooperation and negotiation between the colonial administrators and native Muslims. Some sections of Indian Muslims simultaneously collaborated with and resisted colonial treatment of classical Islamic law. Initially, the project of translation of classical Islamic legal texts was undertaken with the help of a few '*ulamā*'. Some '*ulamā*' also acted as legal advisors and experts in the courts set up by the East India Company.⁸ However, the translation of classical

⁸ Mushiru-l-Haqq, 'Indian Muslims' Attitude to the British in the Early Nineteenth Century: A Case Study of Shāh 'Abdul 'Azīz' (MA Thesis, McGill University 1964).

Islamic legal texts diminished the role of ‘*ulamā*’ over time and eventually they were replaced by lawyers trained under the British education system. This caused severance of classical Islamic law from theoretical and historical linkages with other disciplines of Islamic knowledge such as Arabic language, *kalām* (theology), *tafsīr* (exegesis of the *Qur’ān*) and *ḥadīth* (traditions of the Prophet).

In addition, unlike the pre-colonial *qāḍī*, British judges mechanically applied the translated ‘legal codes’ of Islamic law without any consideration of social context. They also operated under the principle of precedent and strictly applied Islamic legal doctrine of *taqlīd* in order to disallow a liberal construction of classical Islamic legal texts. A liberal and context specific construction of these texts was necessary in order to draw new legal principles and to give a fresh interpretation to existing rules. This caused inflexibility of the law. The problem was exacerbated because of presumptions held by British judges about Islamic law. According to them, Islamic law was based on religion and thus was not subject to change or reinterpretation. However, Muslim lawyers, judges and legal commentators contested these views. They resisted any misinterpretation of Islamic law and challenged the negative presumptions held by the majority of judges. Syed Mahmood, Ameer Ali and Abdur Rahim were the prominent Muslim judges who presented a progressive view of Islamic law. They resisted the colonial legal encroachments upon Islamic law from within the system.

In addition to the decisions of Muslim judges, the most important mode of resistance from within the system came in the form of legal commentaries. As adjudication was chosen to be the primary mode of legal transformation of classical Islamic law, legal commentaries, which systematically organised case law, assumed

vital importance. William Hay Macnaghten was a pioneer in systematically organising the judicial precedents on Muhammadan law in a treatise, but later commentaries were predominantly by Muslims like Ameer Ali, Abdur Rahim, Faiz Tyabji and Asaf Fyzee. Their treatises were not simply a systematisation of judicial precedents, rather they critically analysed case law in the light of classical Islamic legal texts which included a large number of classical texts in addition to the *Hidāya* and the *Fatāwā al-‘Ālamgīriyya*—the two legal texts which were translated into English. Ameer Ali’s treatises played an important role in providing a correct and progressive version of Islamic law on the issue of the validity of the family waqf and also in extending the subject matter of waqf to shares and securities along with other forms of intangible/movable property.

The traditional custodians of Islamic law, the Indian ‘*ulamā*’, were adversely affected under the colonial political and judicial system. As a reaction to the loss of state patronage, they established closer links with the community and organised themselves in institutional forms to safeguard traditional Islamic knowledge. Some of them even tried to run a parallel system of administration of justice. They issued a large number of *fatāwā* on various legal issues. These *fatāwā* did not play a very significant role in legal developments which were taking place under the British judicial system. Some ‘*ulamā*’ however contributed significantly in legislative debates. Their *fatāwā* were sought to establish the validity of family awqāf and to provide for an effective regulatory framework for awqāf. This shows that although their traditional role as the sole custodians of Islamic law was diminished, ‘*ulamā*’ held their status as ultimate authority on Islamic law. They also initiated legislative

enactments aimed at the promotion of women's rights by enabling wives to get divorce through courts and providing shares to females in inheritance.

This study shows that the changes brought into waqf law in British India were associated with the transformation in the nature of the state. The British introduced an impersonal state based on mechanically applied rules. The legitimacy of the state was based on impartial administration of justice amongst diverse communities. The pre-colonial pluralistic, context specific and localized modes of governance were replaced with uniform, centralized and formal institutional structures of administration. The system of adjudication in pre-colonial India was multi-layered. Apart from *qāḍī* courts, the institutions of *mazālim* (complaints to rulers), *ḥisba* (market and public morality), *aḥdāth*, *shurṭa*, *kōtwāl* (police), *dīwān* (revenue and taxes), guilds and village councils exercised judicial powers.⁹ Though their forms and functions varied over time and place, these institutions existed outside Islamic law, but without expressly contravening its principles. The doctrine of *Siyāsa al-Sharī'a* provided justification for deviations from the strict rules of Islamic law.¹⁰ Under this institutional arrangement, informal legal changes could take place without affecting legal texts. However, British rule in India put to an end this arrangement.

⁹ E Tyan, 'Judicial Organization' in M Khadduri (ed) *Law in the Middle East* (vol 1 Middle East Institute 1955) 236-78; MB Ahmad, *The Judicial System of the Mughal Empire* (Historical Society 1978).

¹⁰ MK Masud, 'The Doctrine of Siyāsa in Islamic Law' (2001) 18 *Rech van de Islam* 129; MH Kamali, 'Siyāsa Shari'yah or the Policies of Islamic Government' (1989) 6 *The American Journal of Islamic Social Sciences* 59; KS Vikør, *Between God and the Sultan: A History of Islamic Law* (Hurst & Company 2005)185-205.

Although state institutions displaced traditional institutional structures, the same institutions still provided a platform for divergent stakeholders to negotiate with each other on legal and political issues. These stakeholders held divergent views and interests that could be married through legalistic adjudication as a kind of third-party brokered negotiation. There was also inequality in the bargaining power of each stakeholder. The colonial state wielded disproportionately huge powers. However, as the issue of the administration of public awqāf shows, there were limitations of state power. Colonial administrators acknowledged that they could hardly ignore the views of the orthodox majority of Indian Muslims, and took extreme caution in not offending them. The end result of complex negotiations between colonial administrators, judges, lawyers, legal commentators, politicians, journalists and *'ulamā'* was a legal system which reflected divergent interests held in equilibrium by countervailing political forces.

In the end, the outcome of the application of principles of classical Islamic law in a legal system operated under English adjudicative procedures and by a preponderance of English judges was Anglo-Muhammadan law—significantly different from both classical Islamic law and English law. Its main features included certain manifest contradictions. For instance, Anglo-Muhammadan law was supposedly based on religious injunctions, which were moral in their nature, but it was backed by state authority and did not provide any privileged role for traditional custodians of Islamic law—*'ulamā'*. Rather it was mechanically applied with no consideration of the social and personal contexts of its subjects.

Anglo-Muhammadan law is typically depicted as a displacement of tradition which caused distortion of classical Islamic law in order to serve the interests of the colonial state. The state, it is argued, appropriated and in certain cases invented law in the name of Islamic law in order to promote its colonial agenda.¹¹ It is true that classical Islamic law was made to fit within the colonial political and judicial structure, however, the process under which classical Islamic law was transformed was not undertaken solely by colonial authorities. Indian Muslims played an active role in this transformation. Despite its primary role of controlling the population in the interests of the imperial and colonial state, the overall legal system in its quest for legitimacy had to embrace elements of local laws, pre-eminently Islamic law for the Muslim population, and absorb local mores in its drive to rationalization and modernization. Thus neither ‘rule of law’ nor ‘aborted modernization’ theorists have the story quite right. The Anglo-Muhammadan law of *awqāf* rather suggests a synthesis, whereby local institutions were engrafted with English common-law and legislative institutions to create a distinctive juristic hybrid. This narrative defies the stereotypical depiction of Islamic law and English law as antithetical to each other. It shows that not only that these two legal systems coexisted, but their interaction also culminated in the form of a remarkable synthesis of two different legal traditions. Similar such studies into other areas of law and in other contexts will enrich our understanding about legal convergence and pluralism in a globalised world.

¹¹ See section 4 of the Introduction.

Glossary of Terms

Adalat (Urdu) court	
Ada	custom
Ahl al-kitāb	People of the Book, followers of Abrahamic traditions
‘Ālim	learned in religious sciences (plural ‘ulamā’)
Adāb al-Qāḍī	qualifications, duties and procedural rules followed by a judge
Aḥādīth	traditions (singular ḥadīth) of the Prophet Muḥammad
Al- tamgha	a royal grant in perpetuity; perpetual tenure
‘Aqd	agreement/contract
Anjuman	association, society
‘Āshūra	The tenth day of Muḥaram, the first month of Islamic calendar. The Shī‘a commemorate the martyrdom of Imām Ḥusayn bin ‘Alī
‘Ayn	corpus
Bāṭil	absolutely void
Bayt al-Māl	royal treasury
Benāmī	fictitious name
Dargāh	tomb/shrine
Dār al-Islām	country of Islam governed by Muslims
Dār al-ḥarb	Literally land of war, territories under the governance of non-Muslims who are in a hostile relation with Muslims
Dār al-‘Ulūm	literally house of knowledge, institution of Islamic learning
Ḍarūra	expediency/necessity
Dirham/ Dinār	silver and gold currency
Faqīh	jurist, doctor of canonical law

Fāsīd	imperfect, invalid
Fatwā (pl. fatāwā)	responsa/juristic opinion issued by a jurisconsult (<i>mufī</i>)
Fī sabīl lil Allah	in the way of God
Fiqh	discourse of substantive and procedural law/legal rules
Firmān	official edict of the ruler
Ḥadd	Punishment expressly mentioned in the Qur'ān and the Ḥadīth (plural Ḥudūd)
Ḥadīth	literally 'report', tradition of the Prophet Muḥammad, what he said, did, or tacitly approved
Ḥaq	Right (plural ḥuqūq)
Ḥawāla	transfer of debt
Hiba	gift
Ḥukm	a legal ruling
Ijmā'	consensus
'Ibādāt	religious works or acts of worship
Ijtihād	independent legal reasoning, intellectual exertion with a view to form an independent judgment on a legal question
'Ilm	knowledge, science
Imām	leader of the community
Imāmbāra	Shī'a religious place for holding of meetings to commemorate the martyrdom of Imām Ḥusayn son of 'Alī
Iqtā'	grant of land revenue
Istiḥsān	juristic preference
Istiṣlāḥ	literally, to find something good or serving a public interest; technically, it is a method by which the usual method of deduction, analogy, is excluded in order to reach a legal decision on the basis of rational arguments

Istiṣhāb	literally, continuity; the principle that matters should continue in its 'natural course or expected condition' unless there is a positive reason to change it
‘Iwaḍ	return
Jāgīr	land grant
Kalām	theology
Kazi (Urdu)	qāḍī (judge)
Khānqāh	hospice for a ṣūfī; monastery/abbey
Madhhab	school of thought
Madad e ma‘āsh	aid to subsistence
Madrasa	school of Islamic learning
Mahr	dower paid or promised to the wife at the time of marriage
Makrūh	disapproved
Marḍ al mawt	death sickness
Masjid	mosque
Maṣlaḥa	public interest or good
Mauza	village
Mawlawī	teacher of religious subjects, especially the Qur’ān
Milk	ownership
Muftī	jurisconsult
Mu‘āmalāt	social transactions
Mujtahid	highly learned jurist who is capable of exercising <i>ijtihād</i>
Mutawallī	trustee/manager/superintendent
Nawāb	Urdu term for an official of high rank

Nasl	offspring
Nāzir	supervisor
Pīr	a ṣufī master
Qāḍī	judge
Qānūn	imperial law/law issued by the ruler
Qiyās	analogy
Ribā	literally means excess, interest/usury
Ṣadaqa	charity
Sajjādanashīn	literally seated on a carpet, spiritual leader
Sanad	certificate
Sharīʿat (Urdu)	Sharīʿa, sacred Islamic law
Shufʿa	pre-emption
Siyāsa al Sharʿīyya	discretionary legal powers of the ruler to enforce Sharīʿa
Ṣūfī	Muslim mystic
Sunna	practice of the Prophet Muḥammad, the second source of Fiqh after the Qurʾān
Taqlīd	following the legal opinions of earlier scholars without analysing the reasoning
Taluqdār	holder of a village land
Taziadārī	ceremonies to commemorate the martyrdom of Imām Ḥusayn
ʿUlamāʾ	religious scholars
ʿUrf	custom
Usūl al- Fiqh	principles of law, jurisprudence, science of law and the methodology of legal reasoning
Waqf (Urdu Wakf)	endowment, charitable religious trust, settlement

(Turkish Waqf)

Waqf ahlī family settlement

Waqf Khayrī public charitable trust

Wāqif settlor or founder of a waqf

Wazīr minister in a government

Zakāt compulsory alms to be paid annually on one's accumulated wealth

Zamindār landlord or landholder

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