THE INDIA FORUM
A JOURNAL-MAGAZINE ON CONTEMPORARY ISSUES

May 11, 2025

Amendments to Restrict Creating New Waqfs

By: M. R. Shamshad

The new waqf law is worrying because it grants unchecked administrative power without any clear standards for fair action. It applies unevenly across religions and provides a potentially biased bureaucracy with a tool to obstruct new waqfs. The second in a series on the 2025 amendment.

In earlier articles in this publication, I touched on different aspects of waqf, including the effect of public authorities using statutory powers to intervene in waqf properties ("Wakf Reforms, or a Bid to Control Waqf Properties?" 22 Nov 2024 [with Nabeela Jamil]; " Government's Presumptive Claim on Waqf Properties", 24 April 2025). This article aims to focus on restrictions being imposed on creating new waqf properties by the Waqf (Amendment) Act, 2025.

Our fundamental rights, such as equality, the prohibition of religious discrimination, and equal opportunity in public jobs, are guaranteed to all "citizens" or "persons" in India, regardless of their religion. Against this background, I examine the provisions of the Waqf (Amendment) Act, 2025 on creating new waqfs. The new amendments propose substantially restricting the rights of 'all persons' to create a waqf.

To begin with, the amendment has brought in Section 3(r), which seeks to define a "waqf". The following conditions have been added to the requirements to create a valid waqf.

a) The person creating the waqf must be able to 'show and demonstrate' that they are 'practising' Islam.

b) The person must have been practising Islam continuously for at least 'five years'.

c) There must be no "contrivance" or artificial arrangement in the dedication of the property.

The property must be genuinely and permanently dedicated for purposes recognised by Muslim law, without any attempt to use the waqf as a cover for other motives or to bypass legal requirements.

All the three conditions are either vague or go against the fundamental freedoms of individuals. Showing or 'demonstrating' that somebody has 'practised' Islam cannot be a condition for any citizens or persons dedicating some of their assets to charities of their choice. But when it comes to charity for any purpose recognised by Islam, or a waqf, this condition applies. It is also clear that Muslims are free to donate to charities recognised by other religions, such as Hinduism, Christianity, or Buddhism. Similarly, there are no legal restrictions preventing Hindus or Christians from making charitable donations to organisations associated with other faiths.

> To say that no "contrivance" shall be involved in the dedication of a waqf property is ambiguous. It is a term that will be used by the administrative authorities to create hurdles in dedicating properties to a waqf even if somebody wants to execute a deed for it, which has now been made mandatory.

Vagueness looms large in the provisions. How is somebody going to demonstrate before a public authority that he or she has been practising Islam for at least five years? Does he or she need to keep a count of all the religious practices carried out in the last five years, or does he or she need to be visibly seen practising Islam? At the same time, many administrative authorities have objections if a man wants to sport a beard or a woman wants to wear a hijab. In some places, the wearing of skull caps and offering namaz in public have already attracted condemnation and penal consequences.

To say that no "contrivance" shall be involved in the dedication of a waqf property is ambiguous. It is a term that will be used by the administrative authorities to create hurdles in dedicating properties to a waqf even if somebody wants to execute a deed for it, which has now been made mandatory. Section?104 of the 1995 Waqf Act (since repealed) made it clear that whenever anyone who is not a Muslim donates any movable or immovable property "for the support of waqf—for example, to a mosque, idgah, imambara, or Muslim graveyard", that property automatically becomes part of that waqf and must be managed under the same rules as the rest of the waqf's assets. This ensured that all contributions—regardless of the donor's faith—would strengthen and remain part of the intended religious endowment.

The amendment removes the entire concept of a "waqf by user" from the law. In practice, this means that any informal or customary waqfs—those created and maintained by local communities without formal registration—no longer have legal recognition. By stripping away their status, the amendment attacks the very foundation of these waqfs, which Islamic law and Article?26 of the Constitution protect as a community's right to establish religious endowments. Because "waqf by user" has been practiced continuously for centuries and previous statutes always recognised it, cancelling that recognition now would retroactively invalidate countless historic endowments—something the Supreme Court's non?retrogression principle forbids.

Even otherwise, the Supreme Court clarified in the Babri Masjid case, "Muslim law does not require an express declaration of a waqf in every case. The dedication resulting in a waqf may also be reasonably inferred from the facts and circumstances of a case or from the conduct of the wakif. In the absence of an express dedication, the existence of a waqf can be legally recognised in situations where property has been the subject of public religious use since time immemorial" [(2020) 1 SCC 1].

> The boards now have to forward the application for registration of a waqf to the district collector who will "inquire the genuineness and validity of the application and correctness of the particulars".

The next aspect deals with the addition of Section 36(1A), which states that no waqf shall be created without execution of a waqf deed. This is directly against the established ways for creating a waqf. It is also discriminatory because "endowments by user" have been recognised in other religious endowments. Codified laws of Hindu endowments such as the Odisha Hindu Religious Endowments Act, 1951; Hindu Religious and Charitable Endowments Act, 1959; and Telangana Charitable and Hindu Religious Institutions and Endowments Act, 1987 recognise endowments by user. When it comes to waqf by user, the legislation now de-recognises it.

Similarly, another new provision, Section 36(7), has effectively taken away the power of registration from Waqf Boards. The boards now have to forward the application for registration of a waqf to the district collector who will "inquire the genuineness and validity of the application and correctness of the particulars". In that process, there is a provision for giving notice to the public at large if the application has been made by someone not administering the waqf. This makes registration of waqfs extremely difficult. While doing this, the collector could drag the registration process into a dispute to somehow say that it might be government property. The ambit and extent of the definition of "government property" is stated in section 3(fb) read with 3(fa) of the Waqf (Amendment) Act,?2025.

A new Section 3B has been added, making it mandatory for the details of every waqf registered under this Act (even though registration can be challenging) to be uploaded onto a government portal and database within six months of the amended Act coming into effect. This 'upload' must include details about the waqf property, as specified in Section 3B(2). Further, the central government has the power to prescribe even more details that need to be included in this online record, as outlined in Section 3B(2)(j).

There is a further provision set out in Section 3E that says, "No land belonging to Schedule Tribes under provisions of Fifth or Sixth Schedule of the Constitution of India, shall be declared or deemed to be Waqf property". There are many areas across the country where Muslims are also a part of the Scheduled Tribes. This is so not only in Jammu and Kashmir and the North-Eastern states but also in states such as Jharkhand, Gujarat, Karnataka, Chhattisgarh, and Maharashtra. In Lakshadweep, Muslims are around 95% of the population. By introducing Section 3E, this law seems to have not only removed citizens' right to donate to the charity of their choosing but has also placed a restriction on the very act of creating a waqf.

> Because "waqf by user" has been practiced continuously for centuries and previous statutes always recognised it, cancelling that recognition now would retroactively invalidate countless historic endowments—something the Supreme Court's non?retrogression principle forbids.

One significant change is the repeal of Section 108A, which previously stated that the provisions of the Waqf Act would take precedence over any other laws that were inconsistent with it. Similar provisions exit in most of the religious endowment statutes relating to Hindus for managements of temples and endowments.

For instance, take Section 34 of the Nathdwada Act, 1959; Sections 2, 4 and 5 of the Madhya Pradesh Mahakaleshwar Mandir Act, 1982; Section 33 of the Govinda Ji Temple Act, 1972; and Section 2 of the Uttar Pradesh Shri Kashi Vishwanath Temple Act, 1983, which are all legislations that have an overriding effect. However, in the case of waqfs, the government has decided to repeal this provision. This is a serious encroachment on the rights of Muslims to create a waqf. This legislation appears arbitrary and discriminatory, based on the subjective preferences of those who drafted it.

These amendments are dangerous because they grant unchecked administrative power without any clear standards for fair action. First, they apply unevenly across different religious endowments. Second, they equip an already hostile bureaucracy with a readymade tool to block any new waqf from being created. This unchecked administrative discretion is itself a reason to argue that these laws are unconstitutional. All these amendments to restrict the creation of waqf properties not only violate the rights of Muslims in particular but also those of all citizens in general. The Indian Constitution grants rights to all citizens, but there is a concern that the government is using its majority power to erode these very rights.

M.R. Shamshad is a senior advocate at the Supreme Court of India.