



INDIA AND THE WAQF

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When the Turk, Qutb al-Din Aibak, conquered Delhi and created his Sultanate in 1205, it was the beginning of the colonial era which lasted until 1947. The successive rulers of different countries and nationalities wished to have their capital outside the subcontinent and to introduce laws and customs which were not found in classical Indian languages such as Sanskrit. One of these was the administration of land.

Among the most interesting and intriguing property institutions of Islamic law is the waqf (وَقْفٌ an Arabic word which is rendered as Vakif in Turkish). It is a tax exempt foundation which controls property and has a charitable aim.

On August 7th, 2024, the government of India introduced a bill in the parliament (lower house: लोक सभा 'Lok Sabha' house of the people) to place the waqf under state scrutiny (Waqf [Amendment] Bill, 2024). The board which controls these institutions (केन्द्रीय वकफ परिषद Central Waqf Council) will not only follow Islamic law but be secular according to the Constitution of India. The board will no longer be allowed to declare a waqf on its own.

The waqf is a symbol of Islamic law within Indian administration. For the BJP of prime minister Narendra Modi, it is essential to tackle this question. The BJP and Modi mainly represent the Hindu community which has perceived Muslim traditions such as the waqf as foreign to India.



The so-called ‘foreign’ element is a problem only on the surface. The question is the primacy of the state in land disputes. The waqf is technically inalienable and herein lies the crux. In Islamic law a waqf cannot be established on public land: the foundation is private. Here one sees the emerging of a well-known question in Roman law. It is the distinction between *ager publicus* (public land) and *res privata* (private property).

Some scholars have argued that the tradition of the Islamic waqf reminds them of the earlier Byzantine charitable foundations. Before the rise of Islam, the emperor Justinian (527-565) had legislated precisely on this topic and constituted hospitals, orphanages, retirement homes, and schools dotted all over the Byzantine Empire. Some were also associated with monasteries. While some Hadiths indicate that the prophet Mohammed endorsed what appears to be a waqf, the Quran is explicit in its banning of monasteries. They were different institutions in the 7th century.

India has focused on the relation between public supervision and private ownership and the charitable foundations (वक्फ waqf).

This is a problem of Roman law: the relation between *ager publicus* and *res privata* in relation to the foundation (*εὐαγής οἶκος*). The proof of the existence of this problem is the necessity of jurisprudence by a member of the high court of Constantinople in eleventh century:

καὶ ἠρμήνευσεν ὁ μάγιστρος, ὅτι οἶκους εὐαγεῖς οὐ πᾶν μοναστήριον εἶπεν ἢ γηροκομεῖον ἀλλὰ μόνους τοὺς οἰκείους τοὺς ὑπὸ βασιλέως τὴν σύστασιν δεξαμένους ὡς τὰ πέτρια καὶ τὸ μυρέλαιον. (Eustathius Rhomaeus Peira 15.12.10–13 Zepos)

The magistros explained that the charitable foundations are not always a monastery or hospice but only those private ones which received a constitution from the emperor like the Petria and the Myrelaion.

The charitable foundations derived their legal authority from the state (represented by the emperor). That means that the Byzantine state could supervise and decide their fate.

India wishes the state to have the last say about private and charitable property. The BJP thinks this will contribute to the notion that the Indian State is the ultimate authority in the sub-continent. This is a very byzantine idea.