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Critical analysis of newly promulgated “Islamabad Capital Territory Trust Act 2020” in nexus to FATF (Financial Action Task Force) Requirements

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Abstract

Background: Waqf is considered an important and distinguished institution of Islam. The involvement of huge money and its traditional history makes it more powerful than the western concept of Trust. In Pakistan, the topic gained more importance after the Financial Action Task Force (FATF) enlisted the country into the grey list and required it to reform its laws specifically dealing with Waqf and Awqafs. The purpose of this research is to evaluate the historical background of Waqf in Pakistan. It traces the early laws passed during British Rule in India to deal with Waqf and relates it with modern laws. The study critically analyzes the recently passed Islamabad Capital Territory Trust Act (ICTTA), 2020. After highlighting and describing the salient features of ICTTA 2020, the study then relates it to the guidelines provided by the FATF. This qualitative study depends upon the Primary and secondary data and its Desk Review. The newly promulgated ICTTA 2020 is a comprehensive piece of legislation that empowers the Government to efficiently control and manage the Waqfs. The study also concludes that strict implementation and spreading of ICTTA 2020 gradually to the whole country will suppress many immoral and corrupt practices in the Awqafs.

KEYWORDS

Waqf, Trust, Islamic Law, Pakistan, Islamabad Capital Territory Trust Act 2020, Financial Action Task Force



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Introduction

Philanthropy has great importance and a special place in Islam. The most distinguished feature of Islam which separates it from all other religions is the special emphasis on philanthropy, charity, and the condition of the poor. In Islamic World, Philanthropic foundations are commonly known as “Waqf” and its plural form is known as “Awqāf”. The term “Waqf” is of Arabic origin and it means to cause a thing to stop and standstill. This institution can be considered one of the greatest achievements of Islam, as private property is furnished for charitable purposes in perpetuity with its benefits spent for that specific purpose. For many centuries, this system built magnificent architecture and served society with its enormous wealth. Many Waqfs survived for centuries and some even millennium.¹ One study suggested that the main characteristic of Waqf is its nature of voluntary charity characterized by perpetuity.² Assets of Waqf cannot be disposed of and its memberships are transferable only the benefits of Waqf can be used for a charitable purpose.

According to Sharia, a Waqf can be defined as a holding of an asset and using its benefits for righteous and philanthropist purposes,³ ultimately for the benefit of the ummah as a whole.⁴

Apart from a few dissimilarities, English Trust and Waqf are almost the same.⁵ It was the Islamic concept of Waqf that inspired Medieval Europe for philanthropic endowment.⁶ Further, most of the Islamic scholars are of the view that the concept of Waqf played an important role in the development of English Trust, whereas, Western scholars believed that English Trust has its roots in Roman and Germanic Laws.⁷ The abovementioned and many other scholars believe that the modern system of charity and social welfare in the western world is inspired from the Islamic concept of Waqf.

Research Questions

This study will primarily focus on the Islamic concept of Waqf, Waqf Properties, and related laws in Pakistan. It will answer the following questions;

- To trace the historical background of Waqf in Pakistan
- To analyze the previous laws dealing with Waqf Properties in Pakistan
- To critically examine The Islamabad Capital Territory Trust Act 2020
- To evaluate the Islamabad Capital Territory Trust Act 2020 while keeping in view the guidelines of FATF for Pakistan

- to suggest recommendations for further improvements regarding Waqf

Methodology

In this qualitative research, Primary and secondary sources are collected and analyzed. A comprehensive desk review of both Primary and Secondary sources is conducted to examine the topic of research. Primary sources consist of original statutes passed by the legislature. Secondary sources consist of other research articles, newspaper reports, and statistical data.

This study examined the newly promulgated law dealing with the Trusts. The salient features of this law are described in an easy and understandable style. This study analyzed the previous and repealed laws dealing with the matter. It also evaluates the link between guidelines given to Pakistan by FATF and the newly promulgated law.

Historical Background

Waqf and Awqaf have a brief history, it started even before the independence of Pakistan. In 1894, the Privy Council ordered that the Islamic Foundations be examined charitable and religious organizations must be in Public Control and should not be under any private ownership. Therefore, Awqafs were separated from the Muslim's private ownership and were considered as neither purely religious nor private entities but mixed endowments.⁸

Sir Syed Ahmad Khān, a prominent Islamic reformer, spoke for the restoration of Islamic Waqf in British India.⁹ Founder of Pakistan, Muhammad Ali Jinnah, pleaded in his address before the Indian National Congress in 1906 to restore the right of private ownership of Islamic Endowments, which had been under British control since 1887¹⁰. Muhammad Ali Jinnah presented a Bill to the Imperial Legislative Council in 1909 related to Waqf and in 1911 he succeeded in passing the “Mussalman Wakf Validating Act 1913” which restored private ownership of Waqfs.¹¹

After the Independence of Pakistan, the Waqf System preserved many characteristics of the British Waqf British era laws dealing with the Waqfs remain intact such as; The Punjab Muslim Awqaf Act 1951, The Qanoon-e-Awqaf Islami 1945, The North West Frontier Province Charitable Institution Act 1949 and Mussalman Waqf Act 1959.

The government of Punjab promulgated the West Pakistan Waqf Properties Ordinance 1959, which empowered the Government to remove Mutawallis involvement. In 1960, The Awqaf Ordinance and the West Pakistan Waqf Properties Rules gave complete control over Waqfs to the

Government. It was like the nationalization of the whole Waqf properties all over Pakistan.

After these sweeping changes, Waqfs were controlled by the Provincial and Federal Governments and no longer under the control of Pirs, Mutawallis, Sajjadanashins, and other parasites who regularly misused them for anti-social and personal activities.¹²

The Waqf Properties Ordinance 1961, made the Administrator Awqaf all-powerful and these administrative replaced the Pirs and Mutawallis. All these Government actions annoyed those who were in power and lost their monopoly over Waqf properties. Many petitions were filed in the Supreme Court of Pakistan at that time.¹³

The Council of Islamic Ideology (CII) criticized this aggressive stance of the State and declared that these confiscations were against the spirit of Islam. Federal Shariat Court examined the Waqf Ordinance 1979 along with all existing Acts and finally ruled that nationalization by the Government is not against the Shari'ah and hence validated all the confiscations of Government.

The Government's policy of integration of waqfs and reducing the autonomy of endowments and shrines proved successful but there was some dissent and illegal activities were performed in some places.¹⁴

In Pakistan, the Waqf and Awqaf gradually came under the strict control of the Government which was in direct contradiction to the Mussalman Waqf Validation Act 1913, presented and passed by the founder of Pakistan. In this process, the services and utilities provided by these Waqf properties disappeared but it also eliminated the illegal and misuse of these properties by Pirs and Mutawallis.

Trust Act 1882

The Trust Act 1882 was passed by the British when they were the colonial rulers of India. The Trust Act 1882 is a comprehensive law that was passed to regulate Private Trusts and Trustees. The main aim of this law was to control and administer the Trusts all over India under the supervision of the Government.¹⁵ After independence, Pakistan adopted the Trust Act 1882 with minor amendments and it is being used to date.

Trust Act 1882 was a comprehensive law that deals with the creation, management, administration, revocation, and all other matters related to the Trusts. Although the Islamabad Capital Territories Trust Act 2020 repealed it (to the extent of Islamabad only), yet many terms and ideas are used from the Trust Act 1882. The Trust Act 1882 was promulgated more than a century ago and was not designed to deal with the modern phenomenon of ill management,¹⁶ money laundering and terror financing Hence Government of Pakistan, under the pressure of

FATF, replaced it with the Islamabad Capital Territory Trust Act 2020. The plan is to introduce this new law dealing with trusts all over the country in phases.

Islamabad Capital Territory Trust Act 2020

The purpose of this newly promulgated law is to enact an effective law for the administration, monitoring, and registration of registered Waqf (Trusts) within the territorial limits of Islamabad.

Its preamble stated that the Trust Act 1882 does not cater to effective administration, financial monitoring, and evaluation of the trusts. Islamabad Capital Territory Trust Act 2020, hereinafter will be referred to as ICTTA, 27 August 2020.

This law is among many other statutes recently passed by the Government of Pakistan to fulfil its obligation towards FATF (Financial Action Task Force) recommendations. ICTTA 2020 was enacted to stop the money laundering and misappropriation of funds by misusing the Waqf Properties.

What are Trust/Important Terms defined in ICCTA?

The word trust is often used as a synonym for Waqf. This new law defined Trust as “an obligation annexed to the ownership of property and arising out of the confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of beneficiary”¹⁷. Trustee means any person who accepts the confidence of the author of the trust to the benefit of the beneficiary¹⁸. A Trust Property is defined as the subject matter of the trust; it may be movable or immovable property¹⁹. The important point to note here is that both moveable and immovable properties come under the definition of Trust Property under the ICTTA 2020. Hence, according to a study²⁰ it may be averred that “a trustee is nominal, while the cestui que trust is the beneficial owner of the property.”

The author of the Trust is defined in this law as “a natural person who reposes or declares the confidence and assigns the property to the trustee for the benefit of the beneficiary.”²¹ A beneficiary is a natural person who benefits from the confidence of the trust²².

How Trust is Created:

A valid trust can only be created through an “Instrument of the Trust” which is defined as the instrument by which the trust is declared²³. “A valid trust must be declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered or by the will of the author of the trust or the trustee and its ownership is transferred to the trust”²⁴.

For a trust to be valid the author of the trust must fulfil the following conditions under ICTTA;

- An intention on his part to create trust
- The purpose of the trust
- The beneficiary
- The trust-property
- Transfer the trust property to the trustee

Section 5 of ICTTA states that every natural person is competent to create trust and it can also be created by a minor with permission of the principal civil court of original jurisdiction. Similarly, the ICTTA provided that every natural person can be a beneficiary of the trust, and every natural person capable of holding property can be the trustee of the trust.

Registration of Trust and Issue of Certificate

ICTTA made it compulsory for all trusts to be registered under this act with the Directorate of Labor and Industries, Islamabad Capital Territory. A trust shall provide the following information at the time of its registration;

- Purpose
- Author of Trust
- Details of Trustees
- Beneficiaries of Trust²⁵

The director shall verify the content and particularly provided with the application through investigating or prosecuting agencies who shall submit their report to the director within 14 days²⁶. Another important requirement for obtaining the certificate is that all moveable and immovable properties must be registered in the name of trust under the Registration Act 1908²⁷. Only after all these above-mentioned requirements are fulfilled, the director shall register the trust under this act and issue a certificate of registration to the trustee.

Powers of Director to refuse the Registration on Suspicious Activities

One of the most important conditions laid down by the FATF is to stop the misuse of Trust/Waqf for money laundering and terror financing in Pakistan. The ICTTA specifically laid down the conditions to fulfil those obligations.

At the time of registration, the Director can refuse to issue the registration of any Trust on the following suspicions;

- If he believes that trust is created for some unlawful purpose and is suspected of having criminal proceeds

- If any member of the trust including the author, trustees, or any other person exercising ultimate effective control over the trust is associated with proscribed organizations under the Anti-Terrorism Act 1997 or under the United Nations Security Council Act 1948
- If the under consideration trust is a threat to national security, considered by the report of the district intelligence coordination committee
- If the author of the trust, its beneficiary or trustee, or any other person representing the trust fails to furnish complete details for registration²⁸.

Further, this law empowers the Government to inspect the record of any trust at any time, and trust is bound to comply with such order.

Duties of Trustee under ICTTA

This law described the comprehensive details about the duties of the Trustee. Section 22 to 42 of the ICTTA specifically deals with the duties of the Trustee. Some of the important duties and liabilities of a Trustee are;

- It is the basic duty of the trustee to fulfil the purpose of the trust and to obey the direction of the author of the trust.
- The trustee must collect and hold all necessary information about the author of the trust, co-trustee, beneficiaries, and any other related person.
- The trustee also has to protect the title or trust property by defending all such suits against the trust property.
- The act made it obligatory for the trustee to take proper care of the trust property as a man of ordinary prudence would deal.
- The trustee must remain impartial if there is more than one beneficiary of the trust.
- A trustee is duty-bound to take measures to prevent any harmful and threatening act towards trust property.
- A trustee is bound to keep clear and accurate accounts of the trust property and its income.
- If the trust property consists of money, the trustee can invest it only in promissory notes, debentures, stock, or other securities of a Provincial or Federal Government.

Rights and Powers of Trustee under ICTTA

This law also gave certain powers to the Trustee so he could run the affairs of the trust effectively. Some of the important powers and rights of the trustee are;

- “A trustee is entitled to have in his possession the instrument of trust and all the documents of title if any relating solely to the trust property”.²⁹
- A trustee has also the right to reimburse himself for all the expenses he incurred regarding the trust property or execution of the trust, benefits of the trust property, and protection of the beneficiary.³⁰
- A trustee can file an application in the principal civil court regarding the management and administration of trust property.³¹
- “A trustee is entitled to have the accounts of his administration of the trust property examined and settled.”³²
- The trustee is also empowered to sell or buy the trust property under specific circumstances.³³

Rights and Liabilities of Beneficiary under ICTTA

The beneficiary is the person who is entitled to the benefits of the trust.

Under the ICTTA, the beneficiary has the following rights;

- The beneficiary has the right to the rent and profits of the trust property.³⁴
- Where the beneficiary is competent to contract, he may require the trustee to transfer the trust property to him or any other person.³⁵
- A beneficiary has the right to inspect and take copies of the instrument of the trust accounts and any other related documents.³⁶
- A beneficiary is also entitled to transfer the beneficial interest but only if he is competent to do so under the trust.³⁷
- If the trustee has wrongfully bought the trust property, the beneficiary has the right to have the property or retransfer it.

Removal of Trustee under ICTTA

Under this law, the Trustee holds a very important position. He is responsible for the running of day to day business of trust. The office of trustee is vacated by this death or by his discharge from his office. Section 83 of the ICCTA describes when the trustee may be discharged from his office. He can be discharged;

- When trust is extinguished.
- When he completes his duties under the trust.
- By any means described in the instrument of trust.
- By appointment of a new trustee under this law.
- By consent of himself or beneficiaries.

- By executive orders of the director.
- By the order of the court.³⁸

Appointment of New Trustee

There are certain conditions provided in this act for the appointment of the new trustee. This law provides the following reasons when the office of a trustee becomes vacant;

- If the Trustee dies.
- If the trustee is absent from Pakistan for six months.
- If the trustee leaves Pakistan to reside abroad.
- If the trustee is declared insolvent.
- If the trustee desires to be discharged or refuses to continue.
- If the trustee becomes personally incapable of performing his duties in the opinion of the court.³⁹

Hence when the office of a trustee becomes vacant a new trustee may be appointed in his place by the person nominated for that purpose by the instrument of trust. But if it is not possible to appoint the trustee regularly then the court can intervene and appoint the trustee. While appointing a trustee, the court must give regard to the wishes of the author of the trust, the interests of the beneficiaries, and the benefit of the trust⁴⁰.

Revocation and Extinction of Trust

This law provides certain ways in which a Trust can be extinguished. Following are the instances when the “Trust can be extinguished;

- A trust or waqf is legally finished after fulfilment of its purpose
- The Director (which means Government) can also extinguish the trust if there are sufficient reasons to believe that the activities of the trust are a threat to national security
- Trust is extinguished if Trust property is destroyed and it is not possible to fulfil the purpose of trust due to that destruction
- When there is a stipulation in the instrument of trust that it is revocable”⁴¹

FATF Guidelines and the Islamabad Capital Territory Trust Act 2020

ICTTA is a comprehensive law that is enacted while keeping in view the requirements and guidelines of FATF. It is important to

understand that this law is not only passed due to pressure from FATF but also will play a crucial role in the management and administration of all Waqf properties in the territory of Islamabad. The plan is to expand this law in phases to all the areas of Pakistan hence in its initial phase it is only implemented in the Capital Territory. Waqf properties are reportedly misused by criminals, terrorists, and other negative elements in Pakistan due to a lack of checks and balances but ICCTTA is a comprehensive law that can thwart the designs of all such negative elements if implemented in true spirit.

Another positive impact of ICCTTA is the acknowledgement of FATF regarding the efforts of Pakistan in the right direction. With the passing of this law, FATF is satisfied that Pakistan is making serious efforts to control money laundering and terror financing. FATF kept Pakistan on the Grey List although at one point it was evident that FATF would put Pakistan on the Black List. Due to the passage of ICCTA and other steps taken by the Government of Pakistan, FATF kept Pakistan on the Grey List.

Conclusion

This study has critically examined and analyzed the newly promulgated Islamabad Capital Territory Act 2020 (ICCTA). ICCTA is interpreted and its main features are highlighted and it is also compared with the existing laws dealing with WAQF properties in Pakistan. The study paid a special emphasis on the guidelines provided by FATF for the promulgation of this law and provides a picture of the current scenario related to terrorism and anti-money laundering in Pakistan.

The study concluded that the newly promulgated law is a comprehensive law that is complete in all aspects and provides a better mechanism for the administration and management of WAQF properties. The study also revealed how ICCTA helped Pakistan to remain on the Grey List of FATF. A further Qualitative study can be conducted on the issue while conducting interviews of stakeholders i.e. law enforcement personnel, Waqf representatives, and the general public.

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