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Transfer in Perpetuity for the Benefit of the Public: A Critical Analysis of Waqf Properties

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ABSTRACT

The Transfer of Property Act of 1882 (hereinafter referred to as the Act) is a colonial statute enacted to govern the transfer of properties, movable and immovable, rights, liabilities, and interests attached to it. The assignment shall focus on the exception to the Rule Against Perpetuity, which is Transfer in Perpetuity for Public Benefit. By means of a case study of Waqf properties, a perpetual charitable endowment, the author in this article shall delve into the legalities of such transfers, highlighting the key judicial interpretations along with their social implications. Further, the author shall also identify misuse and challenges in the administration of such properties that undermine the intended public benefit. Furthermore, toward the end of the assignment, the author shall summarize her key research findings and provide suggestions for improving the execution of the laws for the betterment of society.

Keywords: *Rule Against Perpetuity, Transfer in Perpetuity for Public Benefit, Waqf, Charity, Social Welfare, Misuse, Challenges.*

I. INTRODUCTION

It is illogical to imagine a dead person below the grave controlling properties above his grave.²

Section 14³ of the Act lays down the **Rule Against Perpetuity**. To understand this rule, it is essential to understand the term, 'perpetuity'. Perpetuity, in its literal sense, means lasting forever. Thus, it is patently implied what the rule against perpetuity shall mean, i.e. a principle that works contrary to an unlimited period. However, it is impossible to transfer property to some specific person for an infinite time, provided that mortality is the ultimate truth, so why did the need to make such a provision arise? The rule lays down the principle that property shall not be transferable to unborn persons for an indefinite period without creating a prior interest.

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² Ravi Kant Gupta, 'Rule Against Perpetuity' (Rama University) <https://www.ramauniversity.ac.in/online-study-material/law/llb/semester/lawofproperty/lecture-9.pdf> accessed 13 August 2024.

³ Transfer of Property Act 1882, s 14.

The objective behind implementing this rule is twofold:

- Promotion of Trade and Commerce- If a property is locked up indefinitely, it hampers economic development by stagnating trade and commerce.
- Welfare of the Property- Unrestricted transfers encourage investment and improvement in the property that benefits both, the owner and the society.

The idea behind this is that property ownership shall be a dynamic concept and should keep moving and changing. However, there is a crucial exception to this rule and that is the act of transfer in perpetuity for the benefit of the public.⁴ As per Section 18 of the Act,⁵ the rule against perpetuity does not apply when the transfer is done in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.⁶ It is because deeds that are intended to benefit the public shall not be subject to such limitations.

(A) Research Objectives

In this article, the author shall delve into the provision of Section 18 with a focus on its legal rationale and socio-economic impact and to help understand better, there shall be a detailed case study of Waqf properties within the legal framework substantiated with a few case laws. The author shall also enlist the common issues and challenges faced in the mismanagement of Waqf properties. Lastly, the author shall propose a few recommendations to improve governance for public benefit and charitable endowments.

II. WHAT IS SECTION 18?

A public benefit literally means creating a better society for everyone. Actions that contribute to impact society for a positive outcome for the public at large shall be regarded as a public benefit—for instance, social welfare, economic development, public safety, health measures, and many more. Section 18 is an exception to the Rule Against Perpetuity⁷ which allows the transfer of properties perpetually for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.⁸ Public benefit refers to public utility.⁹ Such transferred properties become *res extra commercium*, i.e. not the subject matter of commerce, and therefore, their use can continue indefinitely for the intended purposes. These transfers can be in the name of religion or the public welfare. Religious

⁴ Transfer of Property Act 1882, s 18.

⁵ Ibid.

⁶ John Vallamattom and Anr. v Union of India [2003] 1 SCC 245.

⁷ Transfer of Property Act 1882, s 14.

⁸ Transfer of Property Act 1882, s 18.

⁹ D.V. Arur v Commissioner of Income-Tax [1945] 47 BOM LR 786.

endowments are made for the establishment or maintenance of worship places or any other purpose tangent to religion. Every religious endowment doesn't need to be charitable. When a Muslim man created a Waqf for the benefit of his descendants to maintain a holy shrine, the Supreme Court held it to be a valid transfer in perpetuity for pious purposes under Islamic laws.¹⁰ Similarly, in *Re: Venkata Subbiah*, the Supreme Court that a trust that is created for the maintenance of worship places and for the performance of religious ceremonies shall not be subjected to the general rule under Section 14 and come under the exception of Section 18. As far as religion or its advancement is concerned, gifts or settlements for the establishment of an idol and its worship, for the performance of religious ceremonies,¹¹ for celebrating religious festivals, or for the creation of wakfs¹² are valid even if they offend the rule against perpetuity. All that matters for a property to be transferred in perpetuity is the presence of benefit to the public or a charitable act.¹³ All kinds of transfers, including gifts of a charitable nature or that work for the benefit of the public at large, are covered under the realm of Section 18.¹⁴

III. WAQF: A DETAILED STUDY

The philanthropic tradition of Waqf, rooted deeply in Islamic beliefs, is a way of channelling wealth into the welfare of the public. Creating waqfs is an act of permanently devoting a property, movable or immovable, for public benefit such as religious, educational, or charitable purposes. However, such transfers should only benefit the Muslim community to be called a waqf. This perpetual dedication is permanent, irrevocable, and can never be gifted, inherited, or sold. The Supreme Court has also held that even a Mutawalli, who is the Waqf Manager, cannot sell, mortgage, or lease the Waqf property unless the Court permits or the Waqfnama explicitly provides such power to the Mutawalli.¹⁵ Waqfs are created for religious, educational, humanitarian, or charitable purposes by Muslim persons to serve society. The rationale behind this dedication is to uplift the less fortunate section of society by the principle of charity. Waqfs promote greater qualities of social justice, equity, and social responsibility. Waqfs contribute towards the ever-evolving needs of the society by:

- Advancing literacy and building educational institutes, libraries, and so on.
- Establishing healthcare facilities such as hospitals, clinics and pharmacies.

¹⁰ *Trustees of Sahebzadi Oalia Kuslum Trust v Controller of State Duty*, A.P [1998] 6 SCC 267.

¹¹ *Lunn v Thornton* [1845] 1 CB 379; *Tapfield v Hillman* [1843] 6 Man&G 245.

¹² *Thomas v Kelly* [1888] 13 App Cas 506,515 (HL).

¹³ *Commissioner Of Income-Tax, Gujarat v Swastik Textile Trading Company Pvt* [1978] 113 ITR 852 (GUJ).

¹⁴ *The Trustees of Tribune Press v The Commissioner of Income-Tax* [1939] 41 BOM LR 1150.

¹⁵ *Ahmad Arif v Wealth Tax Commissioner* [1971] AIR 1691.

- Offering assistance to those in need, such as orphans, widows, and the destitute.
- Developing infrastructure by financing public roads and amenities.

(A) Misuse and Challenges to Waqf Properties

Unfortunately, even good and considerate intentions get tapped by ill execution. Sometimes, administration and documentation of transfers get mishandled, and hence, the properties get misused. Some common forms of such misuse are encroachment of Waqf properties, misappropriation of funds for personal and unauthorized purposes, and neglect of maintenance of the properties, which leads to deterioration and corruption.¹⁶ Very often, even political interference contributes to the loss of public trust and revenue and legal disputes. There shall be a balance between beneficiaries' concerns and administrators' responsibilities. There can also be a challenge in maintaining Waqf properties due to changing economic conditions. The fluctuating market rates and inflation are the key players in posing such challenges. The regulatory compliance, financial sustainability, and community engagement represent formidable challenges in the management of Waqf properties, particularly within the context of the Act.¹⁷

(B) Recommendations

The governance of the Act over perpetual transfers for charitable deeds sometimes raises conflicts regarding fair transfers, accountability, and management of such properties. There shall be alternative approaches to the rule against perpetuity that would hold the protection of the rights of future generations. The rule shall be evolved in such a manner that it provides greater flexibility for transfers in certain cases, such as transfers across jurisdictions, to avoid disputes. On the other hand, to strengthen the rule against perpetuity, creating an online directory that links the Aadhar Card and Pan Card of individuals to the Death Certificate Portal will help in automatic transfers to the next heir.

IV. CONCLUSION

The Rule against perpetuity promotes the circulation of property within the economy, ensuring the assets are available for trade, investment, development, and commercial purposes. However, this rule is not rigid and its exception is provided under Section 18 that permits transfer of properties in perpetuity for the benefit of the public. This exception represents the legal system's

¹⁶ Amana Begum, 'Waqf boards are India's big urban landlords. But whose interest are they serving?' (The Print, 10 March 2023) <https://theprint.in/opinion/waqf-boards-are-indias-big-urban-landlords-but-whose-interest-are-they-serving/1430928/> accessed 12 August 2024.

¹⁷ Isha Bharti, 'Waqf Property Management: Balancing Objectives, Constraints and Beneficiary Concerns' [2023] *Jus Corpus Law Journal* 281-298.

recognition of the need to balance economic interests with broader societal and charitable objectives. Transfers, like waqfs, serve as vital instruments for societal development. Despite the noble intentions, mismanagement, encroachment, and misuse of funds are recurring issues that lead to disputes and suppress the public benefit. One of the key findings of this research is the need for greater accountability and transparency in the management of such perpetual transfers. Evolution in the legal framework and smooth cross-jurisdictional transfers should be facilitated to prevent legal disputes and to ensure the right use of such properties. The implementation of technological solutions may streamline the transfer process and reduce potential disputes. To ensure that these properties are being used for their intended purpose, the communities should engage and serve more to the society.
